This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.

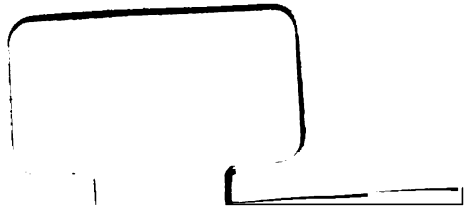
+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.

+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.

+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`



E. Rockwood Hoar

REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

CIRCUIT COURT OF THE UNITED STATES

FOR THE FIRST CIRCUIT.

By CHARLES SUMNER,

REPORTER OF THE COURT.

Nihil est quicquam in jure, quod ad usum Causidici seu Jurisperiti non conducat, quodque vel ad rem ipsam, si non ad rem ipsam, at in exemplum, si non in exemplum, saltem in argumentum, trahi valeat.

PARLEDORIUS, *Epist.* I. *ad Filios*, § 16.

VOLUME II.

BOSTON:

CHARLES C. LITTLE AND JAMES BROWN.

1837.

Entered according to Act of Congress, in the year 1837,
by CHARLES SUMNER,
in the Clerk's Office of the District Court of the District of Massachusetts.

LIBRARY OF THE
LELAND STANFORD, JR., UNIVERSITY
LAW DEPARTMENT.

PRINTED BY FREEMAN AND BOLLES.

TABLE

OF CASES REPORTED.

A.

Adams *et al.*, *v.* Wilbur. 266
Allen, (Hammond *v.*) 387
Almy *et al.*, (Kendall *v.*) 278
Arnold *v.* Clifford 238
Arnold *et al.*, (Dexter *et al. v.*) 108
Ashton *et al.*, (United States *v.*) 13

B.

Battiste, (United States *v.*) 240
Bettes *v.* Dana 383
Brig Sterling, Cargo of 589
Briggs *v.* French 251
Brown *et al. v.* Lull 443
Burdett *et al.*, (United States *v.*) 336
Burley, (Levy *v.*) 355
Burnham, Smith *v.* 612

C.

Cargo of Brig Sterling 589
Cassedy, (United States *v.*) 582
Certain Logs of Mahogany 589
Chain Cable, (United States *v.*) 362

76963

Clarke *v.* Matthewson 262
Clifford, (Arnold *v.*) 238
Coleman, (Jencks *v.*) 221
Columbian Insurance Company (Donnell *et al. v.*) . . 366
Cushman, (United States *v.*) 310
The Same 426

D.

Dana (Bettes *v.*) 383
Davis, (United States *v.*) 482
Dexter *et al. v.* Arnold *et al.* 108
Donnell *et at. v.* Columbian Insurance Company . . 366
Draco, The Brig 157

F.

Flagg *v.* Mann *et al.* 487
French, (Briggs *v.*) 251

G.

Gass *v.* Stinson 453
The Same 605
Gibert *et al.*, (United States *v.*) 19
Gordon *v.* Lewis *et al.* 143
The Same 628
Gordon *v.* Hobart *et al.* 400

H.

Hammond *v.* Allen 387
Hobart *et al.*, (Gordon *v.*) 401
Howe *et al. v.* Sheppard 133
The Same 419
Hunter, (Parsons *v.*) 419
Hurlbert *et al. v.* The Pacific Insurance Company . . 471

J.

Jencks *v.* Coleman 221

K.

Kendall *v.* Almy *et al.* 278

L.

Lane, (Thomas *v.*) 1
Levy *v.* Burley 355
Lewis *et al.*, (Gordon *v.*) 143
The Same 628
Logs of Mahogany 589
Lull (Brown *et al. v.*) 443
Luther, (Taylor *et ux. v.*) 228

M.

Mahogany, Certain Logs of 589
Mann *et al.*, (Flagg *v.*) 487
Mann *et al. v* Wilkinson *et al.* 273
Matthews, (United States *v.*) 470
Matthewson, (Clarke *v.*) 262

P.

Pacific Insurance Company, (Hurlbert *et al. v.*) . . . 471
Parsons *v.* Hunter 419
Pearce, (United States *v.*) 575
Potter *v.* Suffolk Insurance Company 197

R.

Reeside, The Schooner 567
Rines *et al.*, (Smith *v.*) 388

S.

Sarah Ann, The Brig 206
Sheppard, (Howe *et al. v.*) 133
The Same, ... 409
Smith *v.* Rines *et al.* 338
Smith *v.* Burnham 612
Sterling, The Brig, Cargo of 589
Stinson, (Gass *v.*) 453
The Same 605
Suffolk Insurance Company, (Potter *v.*) 197

T.

Taylor, (United States *v.*) 584
Taylor *et ux. v.* Luther 228
Thomas *v.* Lane 1

U.

United States *v.* Ashton *et al.* 13
——— ——— *v.* Battiste 240
——— ——— *v.* Burdett *et al.* 336
——— ——— *v.* Cassedy 582
——— ——— *v.* Cushman 310
(The Same.) 426
——— ——— *v.* Chain Cable 362
——— ——— *v.* Davis 482
——— ——— *v.* Gibert *et al.* 19
——— ——— *v.* Matthews 470
——— ——— *v.* Pearce 575
——— ——— *v.* Taylor 584
——— ——— *v.* Vinton 299

V.

Vinton, (United States *v.*) 299

W.

Wilbur, (Adams *et al. v.*) 266
Wilkinson *et al.*, (Mann *et al. v.*) 273
Wood *v.* Mann *et al.* 316

CIRCUIT COURT OF THE UNITED STATES.

Fall Circuit.

MAINE, OCTOBER TERM, 1834, AT WISCASSET.

BEFORE { Hon. JOSEPH STORY, Associate Justice of the Supreme Court.
Hon. ASHUR WARE, District Judge.

CHARLES THOMAS, APPELLANT

v.

JOSEPH H. LANE, LIBELLANT.

In a libel for a maritime trespass, assault and battery, against two respondents, if there is joint decree for damages, either of the respondents may appeal without joining the other, where the respondents have severed in their pleadings or answers, or jointly pleaded a negative plea in the nature of the general issue. But it seems otherwise, if they had pleaded a joint justification.

The Admiralty jurisdiction as to torts depends upon locality, and is limited to torts committed on the high seas, or at farthest to torts committed on waters within the ebb and flow of the tide.

It seems that torts committed on tide waters within foreign ports are within the Admiralty jurisdiction.

The statutes of 13th and 15th Richard II., respecting the Admiralty, do not affect its jurisdiction in foreign ports.

Every libel for a tort must contain on its face sufficient averments as to place, to show that it is within the Admiralty jurisdiction, otherwise it must be dismissed.

A receipt by a seaman on receiving the sum due to him for wages, stating that it is in full for all services, and demands for assault, battery, and im-

prisonment, &c. against the owner, and officers, is no bar to a suit for an assault, battery and imprisonment. And if it were, it could not avail the party, unless specially relied on in the answer as matter of defence.

Separate and distinct trespasses cannot be joined in the same libel against defendants who are not jointly liable.

A master of a ship, when present, is bound to interfere to prevent gross trespasses and misconduct of his officers towards the crew. If he is present when the officers commit an assault and battery, and he does not interfere, when he may, he is presumed to encourage and consent to it, and is jointly liable for the tort.

LIBEL for an assault and battery, and imprisonment, brought against Charles Thomas, master, and John M. Jordan, mate, of the brig *Moro*, by Joseph H. Lane, a seaman of the same vessel, shipped for a voyage on the high seas, to wit: from Portland to Havana, and back to Portland. The libel asserted the assault and battery, and imprisonment, to be in the harbor of Havana; and set forth the circumstances specially.

The respondents put in a joint answer, admitting the libellant to have been a seaman on board the brig for the voyage; but denied that they had unnecessarily assaulted the libellant, as he alleged in his libel; and further, Thomas denied that he struck or kicked the libellant, as in his libel set forth; but alleged that he caused the libellant, and several others of his crew, to be imprisoned at Havana, for refusing to obey the orders of the master and his own orders, when directed and commanded to discharge and perform their duty on board the said brig; and Thomas further alleged, that he did not order or direct a Spanish officer or soldier to strike the libellant in the boat, or at any time,—nor did he at any time stand by and countenance the mate in striking or abusing the libellant.

And Jordan further answered and denied that he struck the libellant, or knocked him down, or threw him against the windlass, &c. &c., or that he struck or kicked him upon his head or face, &c. &c.; and further, that the libellant, with others of the crew, refused to obey his and the master's lawful orders and

commands; and that their disobedience was the cause of the imprisonment.

No replication was put in by the libellant; and the cause was heard upon the libel, answers and proofs,—and a decree was pronounced against both of the respondents, by the District Court, for one hundred dollars damages, and costs. The respondent Jordan acquiesced in the decree; but the respondent Thomas interposed an appeal on his own behalf, without joining Jordan.

Story J. The present suit is what is technically called a cause of damage, brought by the libellant, a seaman of the brig *Moro*, of Portland, against the respondents, the master and mate of the same brig, for an asserted assault and battery (specially set forth) of the libellant, in the harbor of Havana, and an imprisonment of four days, in continuation of the wrong, on shore, in the same port. There is an answer put in by the respondents, in its form joint, but containing several distinct allegations in defence of each of the respondents, in its nature several and not joint. Although the matters thus set forth assert, as to the imprisonment, a justification, and as to the assault and battery a denial, there is no replication put in by the libellant, (which certainly ought to have been done as to the matters in justification); and the cause was heard (doubtless by consent) upon the libel and answer; and a decree for joint damages was pronounced by the District Judge. The respondent Thomas, alone interposed an appeal from this decree, the other respondent not joining in it.

The first point, made at the bar, is, whether, upon this posture of the case, a several appeal can be maintained by the appellant. The ground of objection is, that the libel is for a joint offence, and the answer is joint; so that the parties have staked their cause upon the sufficiency of the defence as a joint defence; and if bad as to either, it is bad as to both,—and in the case of a joint answer and joint defence, there cannot be a severance of the respondents upon the appeal.

There is a good deal of embarrassment thrown over the cause by the state of the pleadings; and I exceedingly regret, that neither the libel nor the answer have that regularity and certainty of averments, which in strictness they ought to possess. The libel is not drawn in the regular form of articles, articulating (if I may so say) the grievances in a distinct order, and charging each as a joint act of the master and mate. On the contrary, it seems to be a narrative of the events in the order in which the libellant asserts them to have occurred; and the acts of each of the respondents are charged severally against him, without any joint charge whatsoever attributing each act to both, and only by inference leading to the conclusion of any joint co-operation. The answer is equally embarrassing. It begins by asserting that the respondents jointly deny the assault and bruising of the libellant,—it then proceeds to deny that Thomas struck or kicked the libellant, or that he did the other acts charged against him personally, except the imprisonment, which he justifies, in a very general manner, on account of disobedience of orders. It then proceeds to deny that Jordan struck the libellant or did the other acts charged against him; and concludes with a justification of the imprisonment for the same cause as is asserted by Thomas,—so that here are joint and several defences mixed up in the same general answer, in regard to matters variously charged in the libel, some of them in form several, and some of them joint. If all the parties were before the Court, I should not hesitate, under these circumstances, to direct a reform of the whole pleadings, by suitable amendments; and thus to require the charges in the libel to be jointly made, (for several distinct trespasses of the parties severally cannot be properly united in one joint libel), and to allow the respondents to shape their defence accordingly, either jointly or severally, as they should be advised. But Jordan not having appealed, this course cannot be adopted; and the Court is driven to the examination of the case, as it stands upon the pleadings in the record.

Upon the state of the pleadings, I know not how to treat the case as either a libel exclusively upon a joint charge, or as a joint answer to such a charge. It seems to me to be a mixture of joint and several charges, with threads of connexion which I am unable to disentangle or to unite together. I agree to the doctrine of the common law, that if two or more join in a defence, which is a sufficient justification for one, but no justification for the others, it is bad as to all; for the Court cannot sever it, and say, that one is guilty and the others not, when they all put themselves upon the same defence.[1] But, whether the same doctrine applies to libels in the Admiralty, may admit of some question; for the Admiralty proceeds upon a more liberal and less technical system of pleading than the common law. Trespasses may in their nature be several as well as joint; and therefore one respondent may be found guilty, and the other acquitted of them. But whether a Court of Admiralty could sever a joint defence for the purpose of abstract justice, upon the coming in of the proofs, where the parties have put themselves upon a joint justification, good as to one, and bad as to another, is more than I feel at liberty at present to affirm. There is no room for the application of the doctrine here; for I cannot judicially say, that the justification is joint, as to all the torts charged upon the parties in the libel.

But the question here is, not so much as to the effect of a joint justification or defence, as it is as to the several right of appeal of the parties charged with a tort in a joint libel. It seems admitted by the argument, that if the parties had severed in their defence (as they clearly might have done), that either of them might have sustained a several appeal. If that be so, it must be upon the ground, that a tort charged as joint, may be estab-

[1] See 1 Saund. R. 27, note of Williams (3), and the authorities there cited; *Moors* v. *Parker*, 3 Mass. R. 310; *Schermenhorn* v. *Tripp*, 2 Caines R. 108.

lished by proof of its being committed by either party; and in such case, that there may be a several decree of guilt as to one, and acquittal as to another. My opinion is, that there is no difference as to the right of appeal, whether the respondents sever or join in their answer or pleadings, if the defence is several in its nature, as a general denial of the matters alleged, in the nature of the general issue; for then there may be a several decree of guilt as to one, and of acquittal as to the other.[1] It may be otherwise, where there is a joint justification by the respondents; for then it is difficult to perceive, how either can separately contest its proof or sufficiency. The more pressing difficulty is, when there is a joint decree against all the defendants for damages in tort, whether one can appeal alone. There is a distinction, well known at the common law, between suits founded upon the joint contract of the parties defendant, and suits founded upon their tort. In the former, the contract must be proved to be joint, as it is charged; in the latter it need not. Upon a joint justification in tort, a writ of error lies only by all the parties to the justification; for all are aggrieved, if any are. But if they plead severally, and some are acquitted and the others are found guilty, the latter may maintain a writ of error alone; for they alone are aggrieved.[2] In case of an appeal from a joint decree in Chancery against the defendants in the suit, all the defendants affected by the decree must join; but this is because they are united in interest.[3] And in suits in the Admiralty, founded upon contracts, I should have no doubt, that the appeal must be by all the respondents charged, either personally or in interest, by the decree. But wherever the case, though joint in form, is in reality several in its character, as in cases of sal-

[1] See 1 Saund. Rep. 207, *a*. Williams's note.

[2] See 2 Tidd Pract. ch. 43, p. 1054; 2 Saund. R. 101, *e*. Williams's note.

[3] *Owings* v. *Kincannon*, 7 Peters R. 399.

vage, where distinct owners intervene severally, as respondents, each for his own interest, it seems to me, that the decree, though in its form joint, must be treated as several in its operation; and that each defendant must possess a several right of appeal for his own distinct interest. In short, the appeal must be joint, where the interest is joint; and several, where there are distinct and separate interests represented by independent parties in the same suit.

In cases of tort, it seems to me, that the same rule must by analogy prevail, where the defendants have not a joint interest, and do not, by their pleading, assume a joint defence. In personal trespasses, like the present, though the tort should be jointly charged, it is also several in its nature; and one defendant may be found guilty, and the other acquitted. It would seem strange, if the decree of the District Court, should pronounce for a joint trespass, and give damages accordingly, that one party should not be entitled to an appeal, unless the other would join in it; that one party should not be allowed to establish his innocence upon the appeal, because the other had by his submission to the decree admitted his own guilt. Each defendant in such a case has a distinct and several interest in the suit. He may answer severally, and a final decree may be entered in his favor. And if he denies the whole charge jointly with the other defendant, by a general answer in the nature of the general issue, he is not thereby deprived of this right to a separate acquittal, if the evidence warrants it. Suppose the decree in this case had pronounced Thomas guilty, and had acquitted Jordan. The former might certainly have appealed; for he alone would have been aggrieved by the decree. On the other hand, if the libellant had appealed from the same decree, under the like circumstances, it should seem, that the appeal ought to be against both defendants; for if the appeal were against Jordan alone, the libellant could not have a decree against him for

several damages ;[1] and if it were against Thomas alone, it would falsify his own charge of a joint trespass upon his own confession.[2] But, on this, I give no opinion. However, if the decree were for joint damages against both defendants, I do not well see, how the libellant could maintain a separate appeal against one; for that would be to claim several damages against each. But it would be different as to the defendants; for the charge being in its nature several, as well as joint, one might be aggrieved by the decree, when the other was not, and therefore might be entitled to a separate appeal.

I have not been able to find any authorities on this special point; and though the common law modes of proceeding are not strictly applicable to proceedings in Admiralty, the doctrines of the common law, as to trespasses, may well furnish principles to guide the Admiralty in the expositions of its own practice. My opinion is, that in this case a several appeal well lies by Thomas from the decree for joint damages, upon the ground, that the asserted trespass is several as well as joint, and that Thomas has a distinct and independent interest and responsibility in the suit, unaffected by the decision as to Jordan. The appeal therefore must be sustained.

The appeal, then, being properly before the Court, the proceedings may be looked into for all purposes regarding the rights and merits of the parties. And, here, the objections already alluded to, are presented in their full force. The libel is in some parts intended for a joint charge, (whether it states it with all legal precision or not) and in other parts the charge, as it stands, is clearly several, though it may have been intended to be joint. The answer has the same aspects, several in some respects,

[1] See Heydon's case, 11 Co. R. 5. *Halsey* v. *Woodruff*, 9 Pick. R. 555. *Hill* v. *Goodsheld*, 5 Burr. R. 2790. 1 Saund. R. 207. *a.* Williams's note. 2 Tidd Pr. 804, 805.

[2] See Heydon's case, 11 Co. R. 5. *Harris* v. *Butterley*, Cowp. R. 483. 2 Stark. Ev. Pt. iv, p. 1442.

and joint as to others. Now, I think it to be very clear, that separate and distinct trespasses by several persons, charged not jointly but severally, cannot be put into the same libel. If the trespasses are different and distinct, several suits must be brought against the parties; and if they are joined, the libel ought to be dismissed for multifariousness, and a misjoinder of parties. And this is not a mere matter of form; for it may shut out the parties respondent from the testimony of each other, which they would be entitled to in separate suits. The present case illustrates these remarks; for if there had been separate suits brought against Thomas and Jordan, they might have been witnesses for each other under circumstances giving their testimony a peculiar importance.

There is another consideration touching the libel, which presents a more direct admonition to the Court respecting its own jurisdiction in Admiralty. It is no where alleged in the libel, that the trespasses complained of were committed on the high seas, or within the ebb and flow of the tide. It is only said in general terms, that they were committed in the port of Havana; and a part of the charge, viz, the imprisonment of the libellant, is distinctly stated to have been on shore in that port. In regard to torts I have always understood, that the jurisdiction of the Admiralty is exclusively dependent upon the locality of the act. The Admiralty has not, and never (I believe) deliberately claimed to have any jurisdiction over torts, except such as are maritime torts, that is, such as are committed on the high seas, or on waters within the ebb and flow of the tide. With respect to the former, viz, torts upon the high seas, the courts of common law have admitted the jurisdiction;[1] with respect to the latter, viz, torts committed on tide waters, the courts of common law have denied the jurisdiction, where those waters are within the body of any county within the realm. But I am not aware,

[1] See Lord Nottingham's Remarks in 3 Swanston R. 605, 606.

that it has been solemnly decided, that the like doctrine applies to tide waters in foreign countries, where the distinction of counties is unknown; for the statutes of the 13th and 15th Richard 2d, upon which this limitation of jurisdiction is founded, manifestly, by their very terms, apply only to the realm of England, and not to tide waters in foreign countries. My own judgment has always hitherto inclined to the opinion, that at least as to torts upon tide waters in foreign countries, the jurisdiction of the Admiralty attached, seeing that it was its ancient right, and not within the prohibitions of the statutes of Richard 2d.[1] It is, however, a grave question, to which my mind has not been latterly drawn; and I am not aware, that it has ever come under a very solemn review in this country. But be this as it may, and assuming the jurisdiction to be rightful in cases of torts on waters within the ebb and flow of the tide in foreign ports, it is indispensable, to found the jurisdiction, that it should be so stated in the libel; for the Court cannot intend, or infer, that it has jurisdiction; but it must be positively stated. The Court cannot judicially know, that the tide ebbs and flows in the harbor of Havana, or that all parts of that port are within the ebb and flow of the tide, or that all vessels at all times float therein on tide waters. And the difficulty is here increased by the fact, that the gravamen is mixed up with a tort, of which the Court clearly has not jurisdiction, that is to say, the imprisonment on shore; and the frame of the libel does not admit, even if the court were at liberty to unravel it, of a perfect separation of one part of the charge from another. If both of the defendants were by the appeal before the court, this matter might be helped by an amended libel; but in the actual posture of the cause, this cannot be done. So that at least as to Thomas, the libel would seem to be unmaintainable, and ought to be dismissed for want of jurisdiction.

[1] See *De Lovio* v. *Boit*, 2 Gallis. R. 398, 466, 467.

If this objection could be surmounted, it would be proper to go somewhat at length into the other points of the cause. One of them is the supposed acquittance (for not being under seal it cannot be deemed a release) on the back of the shipping paper, by which the seamen respectively, and, among others, the libellant, acknowledge themselves to have received the sums set against their names, "it being in full for our services, and of all demands for assault and battery, and imprisonment, and of whatever name or nature against the said brig, her owners and officers." To such a receipt, given upon the mere payment of wages, and without any distinct compromise, satisfaction or compensation for trespasses, it can hardly be supposed, that any court would listen as a bar to a suit of this nature. It must, under such circumstances, be treated as a paper obtained by fraud, surprise, or undue advantage taken of the party's situation, even if it could otherwise operate in point of law as an extinguishment of the right of action. In the present case, however, it is not set up as a defence in the answer, and therefore it cannot be judicially taken notice of by the Court.

Another point, upon which some stress is laid in the argument, is, as to the liability of the master for the trespasses of his officers. The principles of law upon this subject appear to me to be equally clear and salutary in point of policy. The master has the supreme authority on board of his ship; and has, moreover, a sort of parental responsibility and duty devolved upon him, for the due exercise of it. It is his duty to prevent, as far as he may, any undue exercise of authority by his subordinate officers, and any abuses, injuries and trespasses by them. If he is present, when any of the subordinate officers inflict chastisement upon the crew, he is bound in duty to interfere, and restrain it, if it is improper in its nature or character, or unjustifiable under the circumstances. If he may interfere, and he does not, he must be deemed to assent to, and encourage it; for no officer in his presence has any right to inflict punishment

without his assent or direction, unless upon an emergency, which admits of no delay. It is not sufficient for him to excuse himself from this interposition, upon any notions of courtesy, or of upholding the authority of the officers, or of supporting the harmony and discipline of the ship. The law has entrusted him with summary powers, for the good, not of the officers alone, but of the crew also, and indeed for the general good of the maritime service, in which he is engaged. While he should uphold the just discipline of the ship with a steady confidence, he is to take care, that the crew are not made the victims of the insolence, the passions, or the caprices of the officers under him. If he will stand by, and see the seamen cruelly, brutally and unjustifiably beaten without interference, he ought not to complain, that the law forces upon him the conclusion, that he approves what is done, and means to encourage it by his silence and his authority. He becomes thereby the abettor and supporter of the deed, upon the reasonable ground, that he, who knowingly allows oppression, shares the crime. Such, in my opinion, is the dictate of the law on this subject; and it is wholesome as an admonition and a preventive against the undue resentment and oppression of officers, which so often end in the open mutiny and rebellion of the injured crew. On this head I follow out, with unhesitating confidence, the able argument of the learned counsel for the libellant.

The view, which has already been taken of the case, upon the point of jurisdiction, renders it unnecessary to consider the merits of the controversy, which have been so elaborately and analytically brought out in the argument, and to the force and acuteness of which no one is more ready to pay a voluntary homage, than myself.

My duty is to dismiss the libel, as to the appellant, the only party before the Court, for want of jurisdiction; but there can be no costs allowed, where the Court dismisses the suit for such a cause.

Libel dismissed.

CIRCUIT COURT OF THE UNITED STATES.

Fall Circuit.

MASSACHUSETTS, OCTOBER TERM, 1834, AT BOSTON.

BEFORE { Hon. JOSEPH STORY, Associate Justice of the Supreme Court.
Hon. JOHN DAVIS, District Judge.

UNITED STATES

v.

JAMES ASHTON AND OTHERS.

On an indictment for an endeavor to commit a revolt against the § 12 of the Crimes Act of 1790, ch. 36, it is a sufficient defence of the parties accused, that the combination charged, as an endeavor, was to compel the master to return into port for the unseaworthiness of the vessel, if they act *bona fide* and the vessel is actually unseaworthy.

So if they act *bona fide* and upon reasonable grounds and apparent unseaworthiness, and it is doubtful, whether the vessel be unseaworthy or not. But if the vessel, in such case, be clearly seaworthy, it is no defence.

INDICTMENT against the defendants for an endeavor to commit a revolt on board the ship Merrimack, of Boston, on the high seas.—Plea, not guilty.

At the trial it appeared, that the ship sailed from Boston on Saturday, 23d of August, 1834, on a voyage to Rio Janeiro under the command of Capt. Eldridge. She was then in a leaky condition, and some efforts had been made by the captain

to conceal the extent of the leakage from the crew at the time of their shipment and coming on board. The ship was twenty-nine years old. The crew, on discovering the leak, in going out of port, expressed a wish to the captain to return and have repairs made. The captain declined; but said if the leak increased he would return. On Wednesday, the 27th of August, the vessel encountered a gale, and strained very much; and the crew were up all the night pumping, and were much exhausted. The gale still continued, with every appearance of a continuance. The crew then conversed together, and went to the captain, and requested him to return to Boston to repair; and expressed a firm belief, that the ship was unseaworthy, and that they were all in imminent danger of their lives. The captain declined; but proposed, that they should keep on, and, if necessary, he would stop at the Western Islands for repairs. The crew insisted, that he ought to return back to Boston, and that the hazard of proceeding on the voyage was imminent. And then finding, that the captain persisted in going on the voyage, declaring, that he thought the vessel seaworthy, they refused to do duty any further, and seceded, and remained below several hours, during which time the gale increased, and the ship was in great danger. The captain, at length, in order to induce the crew to return to duty, agreed to return to Boston; and accordingly he wore ship and returned to Boston, where he arrived on the ninth day after her departure. The crew at all other times during the voyage and in all other respects conducted themselves unexceptionably.

There was a good deal of evidence, at the trial, as to the seaworthiness of the ship. The chief mate swore, that in his opinion she was seaworthy. The second mate swore she was not. And there was the testimony of a number of highly respectable witnesses, who had examined the ship before her departure, and who affirmed that she was old and rotten, and in very bad condition, and wholly unseaworthy in all respects; and in their tes-

timony they entered into the particulars of her defects. On the other hand one of the owners testified, that she was bought in July 1834 for $2500, and that about $1000 had been laid out upon her in repairs; and that the owners believed her seaworthy for the voyage; and policies of insurance had been underwritten on her cargo for the voyage, after an examination made of her by one of the officers of one of the insurance companies in Boston; that after some slight repairs she had again gone to sea with the same captain, and a new crew, who made no objection; and that before her last departure she had been surveyed and pronounced to be seaworthy. No imputation or suggestion of fraud or misconduct was cast upon the owners. On the contrary, the counsel for the defendants expressly disclaimed any ground of this sort.

In the course of the trial *Dunlap*, District Attorney, objected to the admission of any evidence to establish the unseaworthiness of the ship as irrelevant to the matter in issue, upon the ground, that unseaworthiness would constitute no defence to the charge in the indictment. But the Court, after hearing *Shipley* and *Moore* for the defendants, overruled the objection, and admitted the evidence.

Upon the posture of the facts, as disclosed in the evidence, a doubt having been suggested by the Court, whether the evidence supported the indictment, the case was briefly argued to the Court by *Dunlap* for the United States.

Story J. I do not think, that the Act for the government and regulation of seamen in the merchants' service (Act of 1790, ch. 56,) has any bearing on the present case. The third section of that Act merely provides for the case, where the mate and a majority of the crew of a vessel bound on a foreign voyage, *after the voyage is begun, and before the vessel shall have left the land*, shall discover the vessel to be too leaky or otherwise unfit to proceed on the voyage; and under such circumstances it makes it the duty of the master to return to port. It does not, in the slightest

manner, trench upon the general rights and duties of the seamen under the maritime law; but merely imposes an absolute duty on the master in the case specified. All other cases and circumstances remain, therefore, as they were before, to be governed by the general principles of law. In the present case the combination to resist the authority of the master is clearly established; and unless the seamen were, by the circumstances, justified in compelling the master to return home, the offence charged in the indictment is fully made out; and the *onus* is on the seamen to establish the justification. If the ship was at the time clearly seaworthy, and fit for the voyage, whether the seamen acted by fraud, or by mistake, or upon a fair but false judgment of the facts, it seems to me the offence was committed. If, on the other hand, the ship was at the time clearly unseaworthy and unfit for the voyage, they were fully justified in insisting upon her return home; and were guilty of no offence. The law deems the lives of all persons far more valuable than any property; and will not permit a master, under color of his acknowledged authority on board of the ship, from rashness or passion or ignorance, to hazard the lives of the crew in a crazy ship, or compel them to encounter risks and perform duties, which are so imminent and overwhelming, that they can escape only by the most extraordinary chances, and, as it were, by miraculous exertions. If he should order them into a boat on the ocean, at a time when they could scarcely fail of being swamped or foundered, they would not be bound to obey. His commands, to be entitled to obedience, must, under the circumstances, be reasonable. The proposition cannot for a moment be maintained, that the crew are bound to proceed on the voyage in an unseaworthy and rotten ship, at the imminent hazard of their lives, merely because the master and officers choose in their rashness of judgment to proceed. It is true, that in all cases of doubt the judgment of the master and officers ought to have great weight, and from their superior intelligence, ability

and skill, it may be relied on with far more confidence than that of the crew. They are embarked in the same common enterprise and risks, and it cannot be ordinarily presumed, that they will hazard their own lives in a vehicle, which is really unfit for the voyage. Still, if the case does occur, if they will insist on proceeding, no matter at what hazard to life, and the ship is unseaworthy, I am clear, that the crew have a right to resist, and to refuse obedience. It is a case of justifiable self-defence against an undue exercise of power. Neither of these cases is of any real difficulty. But the case of difficulty is this;—suppose the ship to be in that state, in which the presumption of apparent unseaworthiness really arises, and the crew *bona fide* act upon that presumption, and the jury should be of opinion, that they acted justifiably upon that presumption at the time; and suppose upon the trial it should turn out, (as in the present case it may) that there is real doubt, whether the ship be seaworthy or not; or upon the evidence the case is nearly balanced in the conflict of credible as well as competent testimony, and the jury should on the whole deem the preponderance of evidence just enough to turn the scale in favor of seaworthiness; but not to place it entirely beyond doubt—I ask, whether, under such circumstances, the crew ought to be convicted of the offence charged, having acted upon their best judgment fairly, and in a case where respectable, intelligent, and impartial witnesses should assert, that they should have done the same; and where even the jury themselves might adopt the same opinion, although there might be an error in the fact of seaworthiness, as established at the trial? I have great difficulty in coming to the conclusion, that under such circumstances the crew were guilty of the offence charged. I am aware of the dangers of not upholding with a steady hand the authority of the master; but I am not the less aware of the necessity of having a just and tender regard for life. Seamen, when they contract for a voyage, do not contract to hazard their lives against all perils which the

master may choose they shall encounter. They contract only to do their duty and meet the ordinary perils, and to obey reasonable orders. The relation between master and seamen is created by the contract; but that relation, when created, is governed by the general principles of law. Unlimited submission does not belong to that relation. I have great repugnance to creating constructive offences, and especially where there is perfect integrity of intention. I am aware, that in some cases crimes may be committed independently of any supposed intention to do wrong. But in most cases, and I think in a case of this nature, the intention and the act must both concur to constitute an offence. There are cases even of the highest crimes, as of homicide, where an honest and innocent mistake in killing another, under circumstances of a reasonable presumption, though a mistaken one, that the party killed intended to kill the other party, when the latter will be excused by law.

I have had this subject a good deal in my thoughts during the progress of this trial, (and the point is certainly a new one); and the strong inclination of my opinion at present is, subject to be changed by any argument hereafter urged, that the defendants ought not to be found guilty, if they acted *bonâ fide* upon reasonable grounds of belief, that the ship was unseaworthy, and if the jury, from all the circumstances, are doubtful, whether the ship was seaworthy, or even in a measuring cast should incline to believe the ship seaworthy. If she was clearly seaworthy beyond reasonable doubt, then the defendants ought to be convicted, for the facts of the combination and resistance are admitted.

Mem. Upon these suggestions of the Court, the District Attorney said, that his own opinion coincided with that of the Court, and that he would enter a *nolle prosequi*. But he had thought it his duty to bring the case before the Court. And the Court said, that the case was very properly brought before it for decision.

UNITED STATES *v.* PEDRO GIBERT AND OTHERS.

It is not a sufficient ground for a delay of the trial of a capital case, that the party wishes it, in order to procure papers from a foreign country, since this Court cannot issue process, which will be effectual in procuring such papers.

Convictions for murder may take place, where the murdered body is not found.

The weight and character of circumstantial evidence.

In order to affect all the officers and crew of a piratical vessel with guilt, the original voyage must have been undertaken with a piratical design, and the officers and crew have known and acted upon such design; otherwise those only are guilty, who actively co-operated in the piracy.

It would not be sufficient to affect them with guilt, if they had known, that the voyage was intended to be an illegal one, as in the slave trade, contrary to the laws of Spain.

The simple fact of presence on board the piratical vessel, where there was no original piratical design, is not sufficient *per se* to affect a party with the crime.

All, who are present, acting and assisting in the piracy, are to be deemed principals.

The prohibition in the Constitution of the United States, "Nor shall any person be subject, for the same offence, to be twice put in jeopardy of life or limb," means, that no person shall be tried a second time for the same offence, after a trial by a competent and regular jury, upon a good indictment, whether there be a verdict of acquittal or conviction. Therefore, the Circuit Court of the United States cannot grant a new trial in a capital case, after a verdict regularly rendered upon a sufficient indictment. *Davis* J. dissenting, *held* that the privilege, intended to be secured by the prohibition, might be waived by the prisoner.

Quære—If this prohibition extends to the State courts?

A new trial may be granted in a capital case, where the jury has been discharged from giving a verdict; for then the party has not been put in jeopardy of his life.

The prohibition in the Constitution is a recognition of an old maxim of the common law, and, therefore, we are to resort to the common law to ascertain its true meaning.

There is no instance of a new trial granted by the English Courts in capital cases, where the indictment was sufficient, and there has not been a mis-trial.

Quære—If the courts of the United States may grant new trials in cases of misdemeanors.

Quære—If Congress may invest the courts of the United States with the power to grant new trials in all criminal cases, capital and otherwise.

A writ of error does not lie at the common law for the refusal of a Court to grant a new trial.

According to the Constitution of the United States, "No fact, once tried by a jury, shall be otherwise re-examined than according to the rules of the common law;" therefore, independent of the express prohibition of the Constitution, there can be no new trial, in a capital case, after a regular trial once had upon a good indictment.

Whether prisoners shall be tried separately or together, rests in the discretion of the Court.

Where the reason assigned for separate trials was, that the prisoners might use the testimony of each other in their defence; *Held*, that this would not justify the Court in the exercise of its discretion.

Quære—If the Court, for the reason assigned, would have a right to grant separate trials, and thus deprive the Government of the right to exclude all the confederates from being witnesses, and render them competent, when they would otherwise be incompetent.

The Clerk of the Court, upon the arraignment of the prisoners, did not further proceed, upon their pleading not guilty, to ask them, how they would be tried, so that they did not make the usual reply, "By God and their country;" *Held*, that, under the laws of the United States, the plea of Not guilty put the prisoners upon the country by a sufficient issue, without any further express words.

A question cannot be put to a witness, the relevancy of which does not appear.

Where the Court instructed the jury, that certain confessions of the prisoners, reduced to writing, and not produced on the trial, ought to be disregarded by the jury, although they came out upon direct interrogatories of the cross-examining counsel for the defence; *Held*, if there was any error in this instruction, it was favorable to the prisoners, and that the suppression of the writings afforded no presumption of law, but of fact only in the case.

If the persons, who made the confessions were not identified, but the testimony was only, that *some* did confess, not being named or identified, such confessions could not be applied to any particular prisoner as proof of his guilt, but might be considered by the jury, so far as they applied to the identification of the piratical vessel.

The log-book is not proof *per se* of the facts therein stated, except in certain cases provided for by statute.

It was proper to admit parol evidence to establish the time of the sailing of the Panda on her voyage, and to prove the course and termination of the voyage, without proving, that the log-book was missing or lost.

The rule, requiring the production of the best evidence, is applied to reject secondary evidence, which leaves that of a higher nature behind in the

power of the party; but not to reject one of several eye-witnesses to the same facts, for the testimony of all is in the same degree.

Where the officers, attending upon the jury, under a mistake of duty, permitted them to read the newspapers,—the officers first inspecting them, and cutting out every thing, that in any manner related to the trial,—and it appeared, that in point of fact the jury never saw any thing in any newspaper relative to the trial, and, after the charge from the Court, were not allowed to see any until they had delivered their verdict, *Held*, that it was an irregularity in the officer, but not sufficient to justify the Court in setting aside a verdict, and granting a new trial, or treating the matter as a mis-trial.

Nor would it be sufficient for this purpose, to show, that some of the jurors drank ardent spirits during the trial, when the prisoners' counsel consented in open Court to this indulgence to those whose health might require it, unless it was also shown, that the indulgence was grossly abused, and operated injuriously to the prisoners.

The indictment charged the piracy to have been committed "on the high seas, within the Admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular State;" *Held*, that this was a sufficient statement of the *venue*, without any further specification of place.

The Crimes Act of 1790, ch. 9, § 8, (as well as the act of 1820, ch. 113,) applies to all murders and robberies committed on board of or upon American ships on the high seas.

A conclusion of an indictment against the form of the statute (in the singular) is sufficient in all cases, where the offence is distinctly within more than one independent statute.

Also a conclusion against the form of the statutes (in the plural) would be good, even if the offence were punishable by a single statute only.

A sworn interpreter may take advantage of the suggestions of others, who are not sworn, with regard to the proper interpretation of testimony, stating the result to the Court as his own interpretation.

Where the prisoners were placed within the bar, and within a reasonable distance from their counsel, who could constantly have free access to them, and to whom the Court stated, that every delay of time for that purpose would be cheerfully given, and it was given; *Held*, that to place the prisoners in the very front benches of the bar, by the side of their counsel, would have been an indulgence inconvenient and unnecessary, and that the Court did not err, under the circumstances of the case, in refusing it.

The Court did not err in refusing to have the order of the prisoners (twelve in number) changed, before the introduction of each of the witnesses for the Government, who were excluded from the court-room, and after the first of these witnesses had been examined and had retired.

The witnesses for the Government were allowed, with the chart of the

Mexican's course before them, to be asked the question, Whether, under the circumstances stated of the supposed time of starting of both vessels, the Mexican and Panda would or would not be likely to meet at the point marked on the chart; *Held*, that this was a direct and proper question, and not leading.

The practice in this Court in capital cases is for counsel to state the points of law, on which they wish instructions to the jury, at some time before the charge is given, that the Court may have time to examine and consider them.

It would be improper to grant a new trial, on the ground of newly-discovered evidence, proceeding from persons, who were charged as joint offenders with the prisoners, and were incompetent at the time of the trial, but have been acquitted.

No Bill of Exceptions lies in any capital case, in the Courts of the United States.

The only mode contemplated by the laws of the United States to revise the opinions of the judges of the Circuit Court in criminal cases is, when the judges are divided in opinion at the trial, and then the point of division may be certified to the Supreme Court for a final decision under the Judicial Act of 1802, ch. 31, § 6.

No Bill of Exceptions lies at common law in cases of treason and felony.

Quære—If one lies in cases of misdemeanors.

If the Court has the power in a capital case to allow a Bill of Exceptions, it is too late to present it, when no tender has been made at the trial, and after the motions for a new trial and in arrest of judgment have been argued and overruled.

INDICTMENT against Pedro Gibert, Bernardo de Soto, Francisco Ruiz, Nicola Costa, Antonio Ferrer, Manuel Boyga, Domingo de Guzman, Juan Antonio Portana, Manuel Castillo, Angel Garcia, Jose Velasquez, Juan Montenegro, otherwise called Jose Basilio de Castro, part of the officers and crew of the Spanish schooner *Panda*, for robbery on the high seas, committed on board the American brig *Mexican*.

The brig Mexican belonged to Salem, and was owned by Joseph Peabody. It sailed from Salem for Rio Janeiro on the 29th August, 1832, under the command of Captain Butman; having on board a valuable cargo, and twenty thousand dollars in specie. On the 20th September, in 33° N. lat. and 34° 30′

W. lon., she fell in with a suspicious-looking vessel, from which she made many efforts, but unsuccessfully, to escape. This vessel, a schooner, having come up with the Mexican, fired a gun, and the captain of the latter, seeing that the schooner was armed with one long and two small guns, and that her decks were crowded with men, felt himself obliged to submit, and accordingly hove to. He was then hailed, and ordered to come on board the strange vessel, which mandate he obeyed in his own boat; but on reaching the schooner, five men jumped into the boat, and ordered it to be rowed back to the brig. On arriving on board the brig, they directed the captain to accompany them into the cabin, where, brandishing their knives, threatening and beating him, they compelled him to give up the money which was in his possession. A communication was then made with their companions on board the schooner, who sent a launch and carried away the treasure. The party on board the Mexican then left, after confining the crew below, breaking the compasses, and destroying the rigging and tackle. They also set fire to the camboose, in which they placed a tub of combustibles, and lowered the mainsail in such a way that it would speedily ignite. A short time afterwards, however, the captain contrived to get upon deck, and extinguished the fire before it had caught the mainsail. They then repaired their damages as well as they were able, and returned to Salem, where they arrived on the 2d of October. Information of what had taken place was immediately disseminated throughout this and other countries, and reached the coast of Africa, where Captain Trotter, commanding the British brig of war Curlew, was then cruising. Circumstances led that gentleman to believe that the schooner Panda, then lying in the river Nazareth, was the vessel which had captured the Mexican. He immediately, therefore, proceeded to take measures against her. These measures resulted in the capture of the Panda, but the escape, for the time, of her crew. No ship's papers or log-book were

found on board of her, although diligently sought for; and, owing to some accident, she shortly afterwards blew up, thereby killing several of the Curlew's men. Captain Trotter then sailed to other ports, still making efforts to discover the crew of the Panda, and at last succeeded in arresting the prisoners, and carried them into Portsmouth, England. By the British Government, they were sent to this country for trial, the offence of which they were charged having been committed on board a vessel of the United States.[1]

[1] Upon the conduct of the British Government, and Captain Trotter, the Court, in summing up to the jury, remarked as follows:

Story J. There was another topic, on which he must say a few words, and that was the remarks, which had been made in relation to the manner, in which the prisoners had been brought here, and upon the circumstances of their capture. He should feel himself unworthy of the station he occupied, if he did not advert to this topic, because, if he rightly understood the prisoners' counsel, an attempt had been made to throw a great deal of doubt over the motives and actions of Captain Trotter, and even of the British Government itself, for having sent the case for trial to this country. The British Government, on this occasion, finding persons in England in custody of one of its own officers, accused of piracy on an American vessel, chose to send those persons here, where the best evidence could be obtained, and where the greatest facilities and advantages for their trial were to be found. Over piracy, all nations exercise equal jurisdiction, and the British Government might justly have exercised it in this case. But they preferred, that the offenders should be tried by the citizens of that country against whom the offence had been committed. And I may say, that this conduct of the British Government can scarcely receive too much praise from an American citizen.

How could this case have been decided in England? None of the crew of the Mexican, or her owner, were there. How could the evidence heard before this Court, and which occupied its attention during the three first days of the trial, have been heard in England? Let us look, too, at the conduct of Captain Trotter. He was an officer of the British navy, stationed on the coast of Africa, with directions to use his exertions in suppressing the slave trade. He was there discharging the particular duty, which had been assigned to him, and was under no obli-

It appeared by the evidence of Jose Perez, one of the crew of the Panda, who had become a witness for the Government, that the schooner Panda sailed from Havana on or about the 20th August, 1832, with Pedro Gibert, master, and Bernardo de Soto, mate, bound for St. Thomas on the coast of Africa, with a cargo of new rum, about thirty bales of cloth, muskets, powder, &c.; that she fell in with the Mexican on the 25th of September, and robbed her of twenty thousand dollars. Of the prisoners, Ruiz, Boyga, Castillo, Garcia, and Montenegro were identified as among those who went on board the Mexican, and actively co-operated in the robbery.

The trial lasted fifteen days. The prisoners were defended by *George S. Hillard* and *David L. Child.* For the United States, *A. Dunlap*, District Attorney.

In the course of the trial, many points arose, and were considerably discussed. These appear in the motion for a new trial, which will be found in a subsequent page, and all received the consideration of the Court in the full and learned Opinion, which was given on that motion.

---

gation to trouble himself about pirates. But he receives information of the robbery of the American brig and that the pirate is supposed to be on the African coast, and immediately goes in quest of her. What motive could this gallant officer have had to interfere in this matter, but a sense of justice, and a desire to protect the rights of the whole world? He had nothing to gain, and he might encounter a great deal of peril, obloquy, and responsibility. Under these circumstances Captain Trotter does interfere. He goes in search of the pirate. And you know, gentlemen, it was no ordinary peril he encountered. Mr. Quentin has stated facts sufficient to prove to you the danger of the undertaking, even when the crew of the Panda were not on board to make resistance. Had the crew remained on board, and used the means in their possession, the loss of lives among the British, they being in open boats, must necessarily have been great.

Now what inducement had Captain Trotter to encounter all this, but a high sense of public duty, not merely to his own country, but to the

On the first day of the trial, *Child* addressed the Court, in relation to a motion for the production of the log-book of the Panda, and read an affidavit from the mate of the Panda and others, stating that the log-book was in the possession of certain parties in Portsmouth, England; that the manifestos of the cargo, &c. of the Panda, were also at the Havana, and might be had by sending for them. Time was requested, in order that these necessary documents might be procured.

The *Court* overruled this motion, on the ground that it could not issue process, which would be effective in procuring the papers alluded to; it had no authority in Great Britain, or Havana. It was also stated, by an English officer, who was one of those, who boarded the Panda, that the log-book of that vessel had never been discovered.

The arguments to the jury, were confined very much to a review of the evidence. *Hillard* for the prisoners, contended that the Panda had been fitted out for a slaving voyage, for which alone, doubtless many of the crew had shipped; and that

commercial world. It is said, that there was something mysterious about the conduct of this brave officer. I have never observed any thing of the kind, gentlemen, during this trial; it remains for you to say, whether any thing of the kind exists. His station was on the African coast, and he could not leave it without orders from home. He made the capture, and communicated it, where he was in duty bound to do, to the heads of the Admiralty. *We know that he did this, because we find the British Government taking cognizance of his act*, and sending the prisoners to be tried here with reference to it. Suggestions had been thrown out, and questions asked, as to whether money had not been divided among the crew of the Curlew. This question no person could misunderstand for a moment. Now, I must say, as an individual, that, on the most careful examination, I have found nothing, done by Captain Trotter, that a man in his situation might not fairly do. The learned Judge farther stated, in reference to this matter, that if, in this first instance of national reciprocity, British officers found themselves accused without sufficient reason, it would be, as it was the first, most assuredly the last time they would expose themselves to such consequences.

if she had robbed the Mexican, only those who had been engaged in the robbery could be punished for it. He cited *United States* v. *Jones*, 3 Wash. C. C. R. 209; Kidd's case, 14 State Trials, (Howell's edition), 123.

STORY J. In summing up the case at the trial, stated as follows. Before I proceed to the facts of the case, it seems proper to take notice of several cases, which have been cited at the bar, to show the danger in capital cases, of relying on presumptive evidence as sufficient proof of guilt. Those cases may be said to constitute the common places of the law, in trials of this sort, always resorted to, to create doubts in the minds of the jury, and to shake our confidence in human testimony. If these cases (some of which, there may be reason to doubt, whether they are founded in truth or in fiction,) are brought to establish any thing, they are brought to establish these propositions on trials on indictments for murder (for they are all of this sort). 1. That there ought to be no conviction for murder, unless the murdered body is actually found. 2. That men have been convicted of murder upon false testimony. The first proposition certainly cannot be admitted as correct in point of common reason, or of law, unless courts of justice are to establish a positive rule to screen persons from punishment, who may be guilty of the most flagitious crimes. In the cases of murders committed on the high seas, the body is rarely if ever found; and a more complete encouragement and protection for the worst offences of this sort could not be invented, than a rule of this strictness. It would amount to a universal condonation of all murders committed on the high seas.

In regard to the second proposition, it is probable, that in some few instances, though they have been rare, innocent persons have been convicted, upon circumstantial evidence, of offences, which they never committed. The same thing has probably sometimes, though perhaps not more rarely, occurred, where the proofs have been positive and direct from witnesses,

who have deliberately sworn falsely to the facts, constituting the guilt of the party accused. But to what just conclusion does this tend? Admitting the truth of such cases, are we, then, to abandon all confidence in circumstantial evidence, and in the testimony of witnesses? Are we to declare, that no human testimony to circumstances or to facts, is worthy of belief, or can furnish a just foundation for a conviction? That would be to subvert the whole foundations of the administration of public justice. If, on the other hand, such cases are addressed as a mere admonition to the judgment of the jury, requiring caution on their part in weighing evidence, in order to guard them against the impulses of sudden conclusions and slight suspicions, there is certainly nothing objectionable in the course, although under the solemn circumstances of the present case, it seems hardly necessary to enforce an appeal, the importance of which is so deeply felt by all, who sit on this trial.

I may, indeed, add another remark, which, strange as it may seem, has nevertheless been justified, as there is every reason to believe, by actual facts. It is not even certain, that criminals, who in capital cases plead guilty, and by confession of their guilt in open Court, submit to the sentence of the law, are always guilty of the offence. Cases have occurred, in which men have been accused and tried and convicted of murder upon their own solemn confession in a Court of Justice, where it has been afterwards ascertained, that the party could not have been guilty, for the person supposed to be murdered was found to be still living, or lost his life in another place, and at a different period. And yet it never has been supposed, that a solemn confession in open Court, was not a just ground to believe the guilt of the party accused. The truth is, that notwithstanding the admitted infirmity of human testimony, and the inherent defects of circumstantial evidence, they still are, and for ever must be, the only solid foundations, on which reliance can be placed, for the due administration of all civil as well as of all criminal justice. It is scarcely possible to take a step in the trial of any matter of

fact, without directly or indirectly appealing to them, as unquestionable and satisfactory sources of human belief.

There are three questions in this case. The first is, whether a robbery was actually committed on the Mexican, on the high seas, as charged in the indictment. The second is, whether it was committed by the officers or crew of the Panda. The third is, whether, if committed by the officers or crew of the Panda, all of them are guilty, or a part only; and if a part, who in particular are guilty. Upon the first question, there is no controversy at the bar. The robbery was committed; and, indeed, is established, if any fact in the case is so, by entirely satisfactory evidence. Upon the second question, it is indispensable to go into a minute and accurate survey of the whole evidence, circumstantial and positive. [Here the judge went into a full examination of all the evidence, leaving all the facts to the jury.] If the jury shall be satisfied that the Mexican was robbed by the Panda, then, upon the third question, there are some principles of law, which require to be accurately considered, in order to arrive at a just conclusion, as to the guilt or innocence of any or all of the parties accused. And, here it is most important to ascertain, whether the original voyage of the Panda from Cuba was intended to be a piratical expedition or not. If it was originally intended to be a piratical expedition, then all of the officers and crew, who knew of such intended expedition, and acted upon it, are to be considered as equally guilty of the robbery of the Mexican, (if the offence was committed), whether at the moment, they are proved to have been active in the acts then done, or not; for, under such circumstances, they must, in the absence of all counteracting evidence, be presumed to co-operate in furtherance of the original design, each doing the duty assigned to him.

If, on the other hand, the original expedition was not intended to be piratical, then those only are to be deemed guilty, who knowingly co-operated in the act of robbery of the Mexican. Co-operation or combination may be express, or it may be implied

from circumstances. All, who were present and acting in the robbery, are to be deemed principals. All who were present, advising, directing, encouraging or assisting in the accomplishment of the robbery, thus performing the part assigned to them in the common piratical enterprise, are to be deemed equally principals. But the other persons, whether they were of the officers or of the crew of the Panda, who did not know of the piratical design, and did not co-operate or aid or take any part in it, though they were present on board of the Panda, are not to be deemed guilty.

In this view of the matter, the nature of the original enterprise, and of the outfit and voyage of the Panda from Cuba become most material for the consideration of the jury. It is not sufficient to affect all the officers and crew of the Panda with guilt, that they should have known, that the voyage was intended to be an illegal voyage,—as a voyage in the slave trade, contrary to the laws of Spain. The evidence must go farther, and satisfy the jury, that the voyage in contemplation by all of them, was to be piratical, as well as illegal. If the voyage was simply illegal, then those only are to be deemed guilty, who co-operated in the piratical act upon the principles above stated.

Let us now examine the evidence in the case, as applicable to all the persons accused severally, upon the supposition, that the original enterprise, is not shown to be piratical.

[Here the Judge went into a very minute examination of the evidence, remarking, that if any were guilty of the crime, Gibert, (the captain), and De Soto, (the owner and mate), must be; for they had the unquestioned command, and control of the ship and crew. He then summed up the evidence, as to the identity of those of the crew of the Panda, who went on board of the Mexican, and as to the acts done by them while on board; and their subsequent conduct and confessions. He added, that against Portana and Guzman, no direct co-operation was proved, unless the original enterprise was piratical, and so known to be by them; and that the sole evidence against Velasquez, was his

assisting in burying the money, as testified to by Perez. In regard to Ferrer, the cook, he remarked, that he was a blackman, and possibly might be a slave, and no act was proved against him. If he was a slave, he was entitled to a very indulgent consideration, for he could hardly, under the circumstances, be deemed master of his own will. As to Costa, the cabin-boy, he suggested, that there was no evidence against him, and his youth and station ought to induce the jury to give his case a very indulgent consideration. Neither he, nor the cook, were likely to have been entrusted with the secret, that the voyage was originally intended to be piratical, if that was the fact, and no co-operation at the time of the robbery, was shown on their part.]

Note. The jury returned a verdict of not guilty in favor of Ferrer, Costa, Portana, Velasquez, and Guzman, and as to the rest of guilty.

After verdict and before judgment, the following motion for a new trial, and in arrest of judgment, was filed by the counsel for the prisoners:

And the said Pedro Gibert, Bernardo de Soto, Francisco Ruiz, Manuel Boyga, Manuel Castillo, Angel Garcia, and Juan Montenegro, prisoners here in the custody of the marshal, after verdict and before judgment, move the Court that the said verdict be set aside, and that a new trial be granted, for the causes following, viz.

I. Because said prisoners, since the rendering of the said verdict, have come to the knowledge, and are enabled to avail themselves, of new evidence, which they believe to be very material for their defence, and that the same, if submitted to a jury, would lead to a result different from the said verdict.

II. Because the said prisoners were not permitted by the Honorable Court to be tried separately on the indictment in said case.

III. Because the said prisoners were never arraigned upon the said indictment.

IV. Because no issue was joined between the said United States and the said prisoners, according to the course of the common law.

V. Because the said prisoners have never put themselves upon the country of and concerning the matters charged in said indictment, and were never inquired of how they would be tried.

VI. Because the said Court overruled a question proposed on the part of the prisoners, to a witness produced by the government, on the ground that the said Court could not perceive the object or bearing of the said question, and when the counsel for the said prisoners had stated to the said Court that to explain would defeat the object of the said question.

VII. Because the said prisoners believe and respectfully suggest, that in the trial of said cause, the jury were misdirected in matters of law, by the said Court, in the following particulars, viz.

1. Because the said Court instructed the jury that one Jose Perez, a witness produced on the part of the Government, was not an accomplice in the commission of the crime alleged in the said indictment.

2. Because the said Court instructed the jury that they might, if they pleased, or they might not, if they pleased, entertain a presumption against the credibility of said Perez, by reason of the refusal of the counsel for the Government to produce the written examination of said Perez, taken at Fernando Po; and, because the said Court declined giving an instruction that the said refusal of the said counsel, after due notice on the part of the prisoners, to produce the said written examination, afforded a legal presumption, that if the said written examination were brought forward, the effect thereof would be unfavorable to the credit of said Perez.

3. Because the said Court instructed the jury that the question of the liability of Henry D. Trotter for the loss and damages occasioned by the capture of the schooner Panda, and by the

detention of her officers and crew, was immaterial on the trial of the issue upon the said indictment.

4. Because the said Court instructed the jury that certain confessions of the prisoners, testified to have been made at Fernando Po, Sierra Leone, and on the passage of the said prisoners to England, and at other places, were proper to be considered by the jury.

5. Because the said Court instructed the jury that the withholding by the counsel for the Government from the prisoners on the trial, of certain writings containing the said confessions or a part of them, was a fact from which the jury might presume what they pleased, provided that they presumed nothing therefrom against the prisoners; and because the said Court declined to give it in charge to the jury, that the suppression of said writings by the counsel for the Government, afforded a legal presumption that if the same were brought forward, the effect thereof would be in favor of the said prisoners.

6. Because the said Court declined to instruct the jury that by the waiver on the part of said prisoners of any legal exceptions, to which said writings might be liable, the counsel for the Government ought to have put the said writings into the case, or the parole testimony of the same confessions which had been proved to have been reduced to writing, ought to have been wholly rejected and considered out of the case.

7. Because the said Court instructed the jury that confessions, testified to have been made by *some* of the prisoners, without the same having been brought home to any of them individually and by name, might be considered by the jury in reference to the case generally, and to the identification of the said Panda as the piratical vessel mentioned in said indictment, and of her crew as the piratical crew; and that the jury must not consider such confessions as evidence upon which to convict any one of the prisoners in particular.

8. Because the said Court declined to instruct the jury, that

the counsel for the Government having produced a part of the papers and documents appertaining to the said Panda, and not having shown that any of the customary papers and documents, which should regularly belong to the said Panda, were detained or destroyed by the officers and crew of the said Panda; or were from any cause missing at the time and place of the seizure of those produced—a legal presumption arises that the log-book of the said Panda was taken at the same time and place, and by the same captors, and that they have it or have destroyed it.

9. Because the said Court declined to instruct the jury that the non-production of said log-book on the part of the prosecution, gives rise under the circumstances aforesaid, to a legal presumption in favor of the prisoners.

10. Because parole evidence was admitted to prove the time of the sailing of the said Panda on her voyage from Havana to Cape Mount, and to prove the course and termination of said voyage, without evidence having been previously adduced, that the said log-book was missing from said papers and documents at the time and place of said seizure, or had since been casually lost.

11. Because the said Court declined to instruct the jury that under the circumstances proved, resistance, flight, or the destroying of the said Panda by her officers and crew, would be exercising the right of self-defence on the part of the said officers and crew.

12. Because the said Court declined to instruct the jury that the failure of the Government to produce, in evidence of the attempt by said Ruiz to blow up the said Panda, the only witness who saw the match, as applied for that purpose, and who is testified to have removed it, affords a legal presumption against the truth of the alleged attempt by said Ruiz, to destroy the said Panda.

VIII. Because the jury were furnished with newspapers, and did read the said newspapers during the pendency of the trial.

IX. Because the said jury, while they had the said cause in charge, drank ardent spirit.

X. And the said prisoners move for a new trial, because the said verdict is manifestly against evidence and the weight of evidence.

And in case that the Honorable Court should not set aside the said verdict and grant a new trial, then said Gibert, De Soto, Ruiz, Boyga, Castillo, Garcia and Montenegro, move the Court to arrest the judgment on said verdict, for the causes following, viz.

1. Because no legal offence is set forth in said indictment, and because the said indictment is uncertain, insufficient and not judicially intelligible.

2. Because the said prisoners were never arraigned, and have never put themselves upon the country for trial.

3. Because no issue has been joined on said indictment according to the course of the common law.

The foregoing is a copy of the original motion. Subsequent to the filing of that, and before argument, the following additional causes were assigned for a new trial.

Because interpreters were admitted to interpret a part of the testimony of said Jose Perez, without being previously sworn to interpret truly and faithfully.

Because the said prisoners were not allowed to be placed near their counsel on the trial, for the purpose of instructing said counsel in the conducting of the defence of said prisoners, when the said counsel had made an application to the said Court for said purpose, and stated that in their opinion, such change of position was necessary for said purpose.

Because the said Court overruled a motion by said counsel, that the order in which said prisoners were placed at the bar on their trial, should be changed, before the introduction of each of the witnesses for the Government, who were excluded from the Court room, after the first of said witnesses had been examined and had retired.

Because the counsel for the Government was permitted, upon objection made by the counsel for the prisoners, to lead the witnesses for the Government, by means of a certain chart, upon which the voyage of the said brig Mexican was delineated, and upon which the point at which the piracy alleged in said indictment had been testified to have been committed, was distinctly marked; and upon a view of said chart by said witnesses, the following question was proposed to them by the said counsel for the Government: viz. Whether, if the said schooner Panda left the port of Havana on the 20th or 26th of August, bound to Cape Monte, on the coast of Africa, and the said brig Mexican left Salem on the 29th of said August, bound to Rio Janeiro, the said vessels would or would not be likely to meet?

Because the said Court declared to the jury, and delivered it as the opinion of said Court, that the prisoners, by their counsel, had no right to pray instructions to the jury on particular points, after the delivery of the principal charge.

Because the said Court declined to instruct the jury that if they believed, upon the evidence, that the said schooner Panda, while lying in a certain river called Nazareth, was suddenly assailed by a superior force, which advanced upon them in hostile array, without hailing or declaring their intention, the officers and crew on board the said Panda, had a right to resist, to flee, or to destroy the said Panda, or to resort to any other means of self-defence, which they might deem expedient.

These motions were argued at great length by *George S. Hillard* and *David L. Child*, for the prisoners; and by *A. Dunlap*, District Attorney, for the United States. The Court, in pronouncing its opinion, went so fully into all the considerations urged as to supersede the necessity of stating the arguments, which occupied three days, and were concluded December 10th. On December 16th, the opinion of the Court was pronounced as follows:

STORY J. This is an indictment for a robbery on the high sea, which is declared to be a capital offence and piracy by the statute of 1790, ch. 9. The prisoners having been found guilty, a motion has now been made for a new trial, upon grounds stated in a written motion submitted to the Court. Upon the grounds thus stated, it is unnecessary for me to say any more at present, than that so far as they purport to be founded upon what took place at the trial in the presence of the Court and jury, they are not admitted by the Court, to present a full, accurate, or just representation of all the facts and circumstances. This remark is made simply to prevent any misapprehension from any silence or acquiescence of the Court upon this subject.

The question now to be considered is, whether this Court has, by the constitution and laws of the United States, authority to grant a new trial in a case circumstanced as the present is. And, in order to free the case as much as possible from any collateral and unimportant considerations, it is proper to state, that in examining this question, we shall, for the present, assume that the Court had jurisdiction of the case; that there has been no mis-trial, in a legal sense, that is, no such irregularity or error in impannelling the jury to try the cause, or in the other proceedings in the course of the trial, as would upon the face of the process and proceedings be fatal as matter of substance, and that the indictment is sufficient in point of law to found a just judgment against the prisoners in conformity to the verdict. In other words, for the purpose of the argument, we shall for the present assume that the jurisdiction is clear, that the indictment is good, and that the trial has been regularly had, and the verdict has been regularly rendered by a competent jury.

Under such circumstances, has this Court authority by the constitution and laws of the United States, to grant a new trial after a verdict regularly rendered of guilty against the prisoners?

The constitution of the United States has exhibited great solicitude on the subject of the trial of crimes, and has declared,

that the trial of all crimes, except in cases of impeachment, shall be by jury; and has in some cases prescribed, and in others required Congress to prescribe, the place of trial. And certain amendments of the Constitution, in the nature of a bill of rights, have been adopted, which fortify and guard this inestimable right of trial by jury. One of these amendments provides that "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury," (with certain exceptions not necessary to be mentioned); and it then proceeds—"Nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb."

Now the question is, what is the true interpretation and meaning of this latter clause? When, in a constitutional sense, can a person be said to be twice put in jeopardy of life or limb? If resort should be had to the grammatical structure and meaning of the words, the natural interpretation would certainly seem to be, that no person should be twice put upon trial for any offence, for which he would be liable, upon conviction, to be punished with the loss of life or limb;—for jeopardy means hazard, danger, or peril; and when a party is put upon trial for an offence punishable with the loss of life or limb, and he stands for his deliverance upon the verdict of the jury, he is thereby put in jeopardy, hazard, danger or peril of his life or limb.

But, fortunately, in the present case, there is no necessity of resorting to mere general principles of interpretation; for the privilege thus secured is but a constitutional recognition of an old and well established maxim of the common law: and, therefore, we are to resort to the common law to ascertain its true use, interpretation, and limitation.

The existence of this maxim as a fundamental rule of the common law in the administration of criminal justice, may be constantly found recognised by elementary writers and courts of justice from a very early period down to the present times.

Thus *Staundford*, in his Pleas of the Crown, (lib. ii. ch. xxxvi. p. 105, 106,) says—("*Home, per common leye, ne mittera sa vie deux foits in jeopardie de trial per un mesme felonie, sinon que sort en ascun especial cas de quel jèo dirra apres.*") A man shall not by the common law put his life twice in jeopardy of trial for the same felony, except it shall be in some special case, of which I shall hereafter speak. And the excepted case, to which he here alludes, he states in the same chapter to be where there is not in the indictment sufficient matter to constitute felony in point of law. And he applies his doctrine directly to the case of a plea of a former acquittal, grounding the sufficiency of it as a bar upon the above maxim. And he then states, that if the acquittal was upon an insufficient indictment, it is no bar to a second indictment for the same offence, (*eo que in tiel cas il ne unque mittoit sa vie in jeopardie sur le matter*), because his life has never been in jeopardy upon the matter. And the like doctrine may be traced up as early as the age of Bracton.[1]

Hawkins, whose work on crown law is deservedly held in very high estimation, states the doctrine in the most unqualified manner. "The plea (says he) of *aurte foits acquit* is grounded on this maxim, that a man shall not be brought into danger of his life for one and the same offence more than once. From whence it is generally taken by all our books, as an undoubted consequence, that where a man is once found not guilty, on an indictment or appeal, free from error, and well commenced before any Court, which hath jurisdiction of the cause, he may by the common law, in all cases, plead such acquittal in bar of any subsequent indictment or appeal for the same crime."[2] And Lord *Hale* recognises the same doctrine.[3] And not to multiply

[1] Staundford, P. C. lib. ii. ch. xxxvi. p. 106. See also Fitz. Abrd. Corone, pl. 444.

[2] 2 Hawk. P. C. b. ii. ch. xxxv. s. 1. 8, 9, 10.

[3] See 2 Hale, P. C. 181. 220. 249, 250. See also Com. Dig. Appeal. G. 9, G. 11.

authorities on so plain a point, Mr. Justice *Blackstone*, in his Commentaries,[1] says, "The plea of *autre foits acquit*, or a former acquittal, is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life more than once for the same offence."

Hitherto we have been examining the doctrine with reference to cases of acquittal only. But the like doctrine, founded on the like maxim, will be found to apply to cases of conviction of a capital offence. And, here, in order to avoid any ambiguity, it may be proper to state, that conviction does not mean the judgment passed upon a verdict; "but if the jury find him, (the party), guilty, he is then said to be convicted of the crime, whereof he stands indicted."[2] For there is, in point of law, a difference between the plea of *autre foits convict*, and *autre foits attaint* of the same offence; the former may be where there has been no judgment; the latter is founded upon a judgment."[3]

Hawkins, after remarking upon the plea of *autre foits attaint*, and saying that one reason why it is a good bar for a second prosecution for the same felony is, "because the life of the defendant was in danger by the first; and it is against a maxim of law to bring a man into such danger more than once for the same offence," proceeds to say, "the plea of *autre foits convict* seems chiefly to depend on this reason, that the party ought not to be twice brought into danger of his life for the same crime."[4] He afterwards makes the known exception, where the verdict is erroneous either in respect of insufficiency of the

[1] 4 Black. Comm. 335. *Regina* v. *Carter*, 6 Mod. 168.

[2] 4 Black. Comm. 362. 3 Inst. 131.

[3] See 2 Hawk. P. C. ch. xxxvi. s. 1. 10. Staundford, P. C. lib. ii. ch. xxxvii. p. 108. 4 Black. Comm. 336.

[4] 2 Hawk. P. C. b. ii. ch. 36. s. 1. s. 10. s. 15.

indictment, or for a mis-trial, &c., so that the life of the prisoners was not in danger at the trial.[1]

The same doctrine is abundantly established in the cases of Appeals and Indictments, reported in 4 Coke Rep. 40 to 47; and especially in the cases of Richard Vaux and William Vaux, there stated, (pp. 40, 44, 45). In the latter case, the Court held, "that the reason of *autre foits acquit* was because, where the maxim of the common law is, that the life of a man shall not be twice put in jeopardy for one and the same offence; and that is the reason and cause why *autre foits* acquitted or *convicted* of the same offence is a good plea; yet it is intended of a lawful acquittal or conviction, for if the conviction or acquittal is not lawful, his life was never in jeopardy; and because the indictment in this case was insufficient, for this reason, he was not *legitimo modo acquietatus*," &c. "So, if a man be convicted, either by verdict or confession, upon an insufficient indictment, and no judgment thereupon given, he may be again indicted and arraigned, because his life was never in jeopardy, and the law wants its end." And the same was ruled in Thomas Wigg's case in the same book, (pp. 45, 47). So in *Armstrong* v. *Lisle*, (1 Salk. 63) where there was a plea of *autre foits convict* to an appeal of murder, the Court said, "At common law *autre foits convict* or *acquit* was a good bar to an appeal, for no man's life ought to be twice endangered for the same offence."[2] And, lastly, Mr. Justice *Blackstone*, in his Commentaries, (4 Bl. Comm. 336) says, "The plea of *autre foits convict*, or a former conviction of the same identical crime, though no judgment was ever given or perhaps will be, (being

[1] 2 Hawk. P. C. b. ii. ch. 36. s. 15. See also 2 Hale, P. C. ch. 31. ch. 32, p. 243, p. 251. *Regina* v. *Goddard*, 2 Lord Raym. 922. *Armstrong* v. *Lisle*, 1 Salk. 63. *The People* v. *Barrett*, 1 John. R. 66. *The People* v. *Casbones*, 13 John. R. 351. See the distinction between a mis-trial, and a new trial in *The King* v. *Fowler*, 4 Barn. & Ald. 273.

[2] See *Smith* v. *Taylor*, 5 Burr. 2798. Com. Dig. Appeal. G. 9.

suspended by the benefit of clergy or other causes), is a good plea in bar to an indictment. And this depends upon the same principle of the former (*autre foits acquit*) that no man ought to be twice brought in danger of his life for one and the same crime."

Thus we see that the maxim is embedded in the very elements of the common law; and has been uniformly construed to present an insurmountable barrier to a second prosecution, where there has once been a verdict of acquittal or conviction regularly had upon a sufficient indictment.

Indeed, so strong has been the influence of this maxim, that it was for ages construed not only to apply to cases, where there had been a verdict given by a jury; but even where the party had been once put upon his trial before a jury for deliverance. And Lord *Coke* laid it down, that after a jury were once charged with a prisoner upon an indictment for treason or a felony, the jury could not be discharged; but were bound to give a verdict.[1] And though that rule has been broken in upon in modern times, and juries have been discharged from giving a verdict in capital cases in cases of pressing necessity; yet it has been done with extreme caution, and confined to cases of pressing necessity; and as we shall presently see, the exercise of it has been greatly doubted, and even denied in cases where the jury were unable to agree on a verdict.

This matter was very gravely discussed in the case of the Kinlocks in 1745; and though the Court upon that occasion did discharge the jury in favor of life, and so let the prisoners at their request into a new defence; yet the judges did it upon great deliberation and debate. And Sir *Michael Foster* on this occasion observed, (and it illustrates the force of the maxim) that "it was not to bring the prisoners' lives twice in jeopardy,

[1] 3 Inst. 110. 1 Inst. 227, 6. See also Foster, C. L. 28 to 37. 2 Hawk. P. C. b. ii. ch. 47, s. 1.

which is one inconvenience of discharging juries in capital cases, but merely in order to give them one chance for their lives, which, it was apprehended, they had lost by pleading to issue." So that even this humane judge felt that it was trenching upon the maxim, and that when once the party was put on his trial before the jury, if the jury were discharged he was subjected to be put twice in jeopardy for the same offence.

Hitherto we have been chiefly considering the case of a new indictment, to which the party pleads the former indictment and a verdict of acquittal or conviction. And it was fit so to do, in order to understand the full import and bearing of the language of the maxim. But the question now more directly presented is, whether the same maxim equally applies to the case of a new trial moved for in a capital case upon the same indictment. It is impossible, I think, to doubt that, in England, the maxim according to the doctrine of the English courts of justice does apply to and govern the case of a new trial. As soon as a capital case is fully committed to a jury, the life of the prisoner is in their hands, and he stands in jeopardy of his life upon the verdict of the jury. He is in the truest sense put upon his deliverance from the peril. When once the verdict is pronounced, the case is fixed. If there is a verdict of acquittal, it is generally agreed that he cannot be put upon his trial again for the same offence. And why? Because it contradicts the direct language of this maxim of the common law. He would again be put in jeopardy of his life. And how does the case at all differ in principle in the case of a conviction? The fact is the same. He is again put in jeopardy of his life. He is again to be tried, and acquitted or condemned. If it be said, that it is for his benefit and in favor of his life to have a new trial, that may be true; but there is in the body of the maxim no such qualification or limitation of its meaning. It is nowhere laid down as a part of the maxim that if he is acquitted he shall not be tried again; but if he is convicted he may be allowed a new

trial. And if the Court are to assume the power in favor of the prisoner; why may it not equally assume it when it will prevent a manifest fraud upon the administration of justice to suffer his acquittal to remain? Cases may easily be put where an acquittal may have been produced by gross bribery of the witnesses, by false testimony fraudulently procured by the prisoner, by spiriting witnesses away, and even by means still more offensive and revolting to public justice. And yet no case has as yet been produced of a new trial granted against a prisoner upon such grounds. In *The Queen* v. *Carter*, (6 Mod. R. 168) Lord Chief Justice *Holt* stated a case where a rank perjury had gone unpunished from some defect in entering of the record of the former case, in which the perjury was alleged, for that (the first trial for perjury) was final, so as the party could never be tried thereon again. It is true, that in order to avoid difficulties of this sort, the courts in the reign of Charles II. (that reign of bad precedents) did sometimes go so far as to discharge juries before a verdict was given, where there was reason to believe that evidence was suppressed, or that there was not enough to convict the prisoner, or that there was reason to suspect malpractice. And even Lord *Hale* fell into this erroneous practice, and endeavored to justify it.[1] But it has since been wholly repudiated, and it met the decided disapprobation of Sir *Michael Foster*.[2]

But in point of fact, there is no instance of any new trial having been granted by the English courts in capital cases, where the indictment is sufficient, and there has not been a mistrial, upon the plain ground that it would violate the integrity of this fundamental maxim of the common law. Indeed, for a great length of time the opinion prevailed, that there could be no new trial granted in any criminal cases, even where the in-

[1] 2 Hale, P. C. ch. 41, p. 294, 295, 296.

[2] Kinlock's case. Foster, C. L. 30, 31.

dictment was for a mere misdemeanor, although it is manifest that the maxim does not apply except to capital felonies. Mr. Justice *Blackstone* has indeed in his Commentaries said, "In many instances where, contrary to evidence, the jury have found the prisoner guilty, their verdict hath been mercifully set aside, and a new trial granted by the Court of King's Bench; for in such a case, as hath been said, it cannot be set right by attaint. But there hath as yet been no instance of granting a new trial, where the prisoner was acquitted upon the first." Now, from the other citations already made, it must be manifest that the learned commentator was referring to cases of mere misdemeanors. And he cites in support of this doctrine the case of *Rex* v. *Read*, (1 Lev. 9), *Rex v. Smith*, (T. Jones, 163), and *Rex* v. *Simons*, (10 State Trials, 416. s. c. 19 Howell[1] State Trials, 680), which were all cases of mere misdemeanors. Even as late as this very case of *Rex* v. *Simons*, it seems to have been deemed a very unusual course to grant a new trial in any criminal case, where the party was convicted. And in this very case the distinction, as to granting new trials between capital cases and other criminal cases was already recognised; and well it might be, as the maxim applies only to offences where the party is put in jeopardy of life or limb, which the defendant clearly is not upon an indictment for mere misdemeanors.

In *Rex* v. *Mawbery* (6 T. R. 638) Lord *Kenyon* lays it down expressly that "in one class of offences, indeed, those greater than misdemeanors, no new trial can be granted at all." In a note to the case of *Rex* v. *Inhabitants of Oxfordshire*, 13 East R. 416, note,[2] Mr. *East*, himself a most able and exact crown lawyer, says, "In capital cases at the assizes, if a conviction take place upon insufficient evidence, the common course

[1] 2 Hawk. P. C. b. ii. ch. 47. s. 12; and see Mr. Curwood's note, ibid.

[2] See 2 Hawk. P. C. b. ii. ch. 47, s. 12; and see Mr. Curwood's note, ibid.

is to apply to the crown for a pardon, upon a full report of the evidence sent in by the learned judge to the Secretary of State for the Home Department. But I am not aware of any instance of a new trial, granted in a capital case; and upon the debate of all the judges in *Margaret Tindler's case* in 1781, it seemed to be considered that it could not be." And this is admitted to be the received and settled doctrine in England, by every elementary writer upon the criminal law, who treats of the subject. Thus Mr. *Chitty* says in his work on criminal law, that in case of felony or treason, it seems completely settled that no new trial can in any case be granted. But if the conviction appear to the judge to be improper, he may respite the execution, to enable the defendant to apply for a pardon.[1] The like doctrine is stated by Mr. *Russell*, in his work on crimes.[2] And to show how inflexibly the doctrine stands in the jurisprudence of the common law, it may be added that in the report made to Parliament by the Commissioners on the Criminal Law, at the very last session, it is stated as a known fact, that parties charged with felonies "cannot have a new trial." Indeed, the total silence of the English books upon this subject during the last three hundred years, is as significant as any positive expression could be. Considering the vast number of capital trials, amounting to hundreds every year, during this long period, the total absence of any trace of a motion for a new trial, in any capital case for misdirection of the court, or upon the discovery of new evidence, or because the verdict was against the weight of evidence, or for any other causes not amounting to a mis-trial, where the indictment was good, is perhaps the strongest possible

[1] 1 Chitty Crim. Law, p. 654, (English Edit.) S. P. Christian's note to 3 Black. Comm. 388.

[2] 2 Russell on Crimes, B. 6, ch. 1, s. 1, p. 589. (2 Lond. Edit.) See also 2 Tidd. Pract. p. 820. *Rex* v. *Fowler*, 4 Barn. and Ald. 272. *Rex* v. *Edwards*, 4 Taunt. R. 309.

proof, that the power was not supposed to exist in any of the courts.

This then was the actual posture of the common law on this subject, and this the received interpretation of the maxim, at the time when it was solemnly incorporated into the Constitution of the United States, as an article of a bill of rights. If this clause does not in legal contemplation, prohibit the granting a new trial after verdict in a capital case, then there is nothing in the Constitution which does prohibit it, even in cases of acquittal. It may be said, that in practice a new trial is never granted in any criminal case after an acquittal. And as a matter of practice, we know that such is the common course.[1] But in misdemeanors, it is perhaps still open to inquiry, whether the court do not possess the power, if it should choose to exercise it.[2] At all events, if any clause of the Constitution does not prohibit the grant of a new trial after verdict in capital cases, there is nothing to prevent Congress from investing the Courts of the United States, with the power of granting new trials in all criminal cases, (capital or otherwise), as well in cases of acquittal as of conviction, a power which, I imagine, has never hitherto been generally supposed to belong to that body, and which is truly alarming, both in its nature and its exercise.

Let us now see, how the American authorities stand upon the same subject. And here, it is proper to state, that my researches have not enabled me to ascertain a single case, solemnly adjudged in the United States before the adoption of the Constitution, in which after a verdict, regularly obtained, a new trial has been granted in a capital case.

---

[1] 2 Hawk. P. C. ch. 47, s. 12, and Curwood's note, 4 Black. Com. 361. *Rex* v. *Mann*, 4 M. and Selw. 337.

[2] See 1 Chitty Crim. Law, 657, (London Edit.) and cases there cited. *Rex* v. *Reynall*, 6 East R. 315. Coventry and Hughes Dig. Trial IX, pl. 5, 6. *The People* v. *Olcott*, 2 John. Cas. 301. Foster, C. L. 22 to 40.

In the *State* v. *Hopkins*, in 1794, (1 Bay R. 373),[1] the prisoner was convicted of passing a ten pound bill, knowing it to have been forged; and he moved for a new trial; and it was granted by the court. There was another count in the indictment for forgery, upon which he was acquitted. It does not distinctly appear upon the face of the Report, that the offence was capital, though the argument of counsel would lead us to that conclusion. But no point was made at the argument as to the power of the court to grant a new trial. It was silently taken for granted on all sides. Now, whether the laws of South Carolina, gave such a power to their court in such cases, is what I have no means of knowing. But it is material to state, that the Constitution of South Carolina, contains no prohibition on the subject. There is no clause in it, like the prohibitory clause in the Constitution of the United States. The point not having been made, the court did not even advert to it.

In *United States* v. *Fries*, in 1799, (3 Dallas R. 515), which was a trial for treason, in the Circuit Court of the United States for Pennsylvania District, before Judges *Iredell* and *Peters*, a new trial was actually granted. This is an authority directly in point, and its bearing cannot be overlooked. But there are circumstances in the case, which greatly weaken if they do not impugn its authority. The counsel for the prisoner contended, that though it was not usual, to grant a new trial in a capital case, it was unquestionably in the power of the court so to do; and for this they cited 4 Black. Comm. 391, (probably intending p. 361), 1 Burr. R. 394, 2 Str. 968, and 6 Co. 14. Now, it will be found upon examination, that not a single one of these citations justifies the doctrine contended for. The citation from *Blackstone*, (p. 391, if the page be not miscited,) contains not one word on the subject. If p. 361 was intended, the doctrine, (as we have already seen), applies only to misde-

[1] See also *The State* v. *Duestoe*, 1 Bay R. 377.

meanors. The case in 1 Burr. 394, was a civil suit, and in which, Lord *Mansfield* discussed the right to grant new trials, with reference to such suits only. The case in 6 Coke R. 14, (Arundell's case), was upon a motion in *arrest of judgment*, because there was a *mis-trial*, the jury having in that case (murder) been drawn, not out of the parish, but from the vicinage of the city, or as it is phrased, that the venue ought to have been out of the parish, and not out of the city. And the Court adjudged that "the *trial* was insufficient, and a new *venire facias* was awarded to try the issue again, for *his* (the prisoner's) *life was never in jeopardy*." This therefore was not a motion for a new trial, grounded upon matters, *dehors* the record, but for matters of error on the face of the proceedings, showing that there had been a mis-trial, or no lawful trial at all; in other words, not by lawful jurors. In *Rex* v. *Gibson*, (2 Str. R. 968), the defendant was indicted for forgery, (of what sort is not stated), and would have moved for a new trial, (for what cause is not stated), without appearing in Court; and the Court refused to hear the motion, on account of his not being present. The same case is reported in 7 Mod. R. 205, where it is stated to be the forgery of a note, and it must have been a forgery at the common law, which was only a misdemeanor; for it appears that the offence, was charged in the indictment to have been committed in 1713; and it was not until the Stat. of 2 Geo. 2, ch. 25, (1729), that forgery of a note was made a capital offence.[1] In *Fries's case*, the counsel for the government, admitted the power of the Court, to grant a new trial in capital cases, and argued solely against the validity of the grounds assigned for granting it in that case. The point was therefore not argued; the clause in the Constitution of the United States was not even alluded to, much less reasoned out. The Court did not, in giving

[1] 4 Black. Com. 249.

their judgment, in any manner speak to the point; and the judges were divided in opinion, as to the propriety of granting a new trial, for the cause shown; but Judge *Peters* yielded his opinion, and acquiesced in granting the new trial. Now, under such circumstances, it is not too much to say, that the Court might have been surprised into the decision; and certainly in a case of constitutional law, it ought to have no decisive influence, especially (as we shall presently see) that in the very state of Pennsylvania, in whose Constitution a like clause exists, and where this cause was tried, the power has been solemnly denied to exist under stronger circumstances.

In the *Commonwealth* v. *Hardy*, in 1807, (2 Mass. R. 303), the Supreme Court of Massachusetts granted a new trial, in a capital case, because there had been a *mis-trial*, the prisoner having been arraigned before an incompetent tribunal, and therefore in legal interpretation, the trial was utterly void, as *coram non judice*. No one can doubt the propriety of this decision. But it stands wide of the present question.

In the *Commonwealth* v. *Green*, (17 Mass. R. 515), the very point of the right of the Supreme Court of Massachusetts, to grant a new trial in capital cases, after verdict, was brought before the Court, and argued at large; and the decision was in favor of the power; but the new trial was denied upon the merits. In delivering the opinion of the Court, Mr. Chief Justice *Parker* said, "It appears by the English text books, and by several decisions cited in support of the position, that in cases of felony a new trial is not *usually* allowed by the Courts of that country. But whatever reasons may exist in that country *for this practice*, we are unable to discern any sufficient ground for adopting it here." Now, with the greatest deference for that learned Judge, I cannot admit, that this language truly represents the state of the English common law doctrine on this subject. On the contrary, as I understand that doctrine, it is no matter of *practice* at all (usual or unusual), in respect to which the English

Courts are at liberty to exercise any discretion; but it is a matter of power, which a fundamental maxim of the common law prohibits the Courts from exercising, in all cases (subject to the exceptions already adverted to); and which disability, nothing but an act of parliament can remove. It is a matter of right of every British subject, which constitutes a part of his freedom, like other great rights secured by Magna Charta. If it were a matter of mere practice, there might be some ground for an American Court to adopt or reject it. But if it is a great common law right, then it stands upon a very different foundation. The learned Judge goes into a train of reasoning to show, why in cases of acquittal, no new trial should be granted, in relation to those, whose lives have been once put in jeopardy; and also, to show that in cases of conviction, the same reasons for denying a new trial, do not apply. But I cannot find that he any where denies, that if a new trial is granted in a case of conviction, the party is put a second time, in jeopardy of his life. But it is no part of my right or duty, to enter upon the examination of the reasoning of the learned Judge in that case. First, because, in the Constitution of Massachusetts, there is no clause similar to that contained in the Constitution of the United States; and it is for the Supreme Court of the State, and not for me to decide what portion of the common law is in force therein. And secondly, because the Supreme Court of the State, is the appropriate and exclusive judge of its own powers under the constitution and laws of the State; and it may well be, that it has complete power to grant new trials in capital cases, when no such power exists in the Courts of the United States. If this were not (as I think it is) a question of constitutional law, under the Constitution of the United States, but under the laws of the United States, I can read in the Judiciary Act of 1789, ch. 20, s. 17, that the Courts of the United States have not a universal power to grant new trials, but only "power to grant new trials, in cases where there has been a trial by jury, for reasons for

which new trials have been *usually* granted in Courts of law." As far as the reasoning of the learned Judge goes, it may show that it may be of great public utility, to have the power to grant new trials, in cases of capital convictions, and not in cases of capital acquittals. But this reasoning must address itself to the framers of the constitution, and not to those who are called upon to administer its actual provisions.

A case has also been cited from Virginia, (*Commonwealth* v. *Jones*, 1 Leigh's Reports, 598), where a motion for a new trial was entertained by the Appellate Court in a capital case after a conviction; and upon the merits was denied. But to this case as an authority bearing on the present question, two objections may be properly made; first, that the point was not made at the argument, nor considered by the Court; and secondly, that the Constitution of Virginia contains no prohibitory clause bearing upon the point; and consequently the right to entertain such a motion was dependent wholly upon the local jurisprudence; and whether it was conferred upon the Court was matter of local law, turning upon no general principles.

Another case has been cited from the Indiana Reports, (*Jerry* v. *The State*, 1 Blackford R. 395), in which a writ of error was brought in a capital case from a judgment of an inferior court, refusing to grant a new trial to the prisoner after a conviction, which was moved for upon the ground that the verdict was contrary to evidence. The Supreme Court of the State ordered the judgment of the Court below to be reversed, and the verdict set aside, and a new trial granted upon the ground that strong doubts remained, whether the testimony supported the verdict. Upon this case it may in the first place be remarked, that a writ of error for the refusal of a court to grant a new trial does not lie at the common law; and so it has been repeatedly held in the Supreme Court of the United States, the granting of such new trial in any case being a matter of discretion. So that the case must stand upon some peculiarity of the local

jurisprudence. And in the next place, though the Constitution of Indiana does contain a prohibitory clause, like that in the Constitution of the United States, it is not even alluded to in the Opinion of the Court, short and unsatisfactory as it is; and therefore we cannot know whether the point has ever been argued in that State, or not. Under such circumstances the case can have no intrinsic authority here.

In no one of the cases heretofore cited has the clause of the Constitution of the United States been brought under the review of the Court, or its interpretation ascertained. But there are cases in other courts of great respectability in which the question has come solemnly in judgment; and the true intent and meaning of the clause has been severely sifted. If I do not greatly mistake, some of these cases will be found to carry an opposite doctrine far beyond the limits necessary for the decision of the present case. One of these cases is *The People* v. *Goodwin*, in 1820, (18 John. R. 187), where the whole subject was most elaborately examined by the counsel and the Court. It was an indictment for manslaughter, and the jury, after the whole cause was heard, being unable to agree, were discharged by the Court without the consent of the defendant. The question was, whether under these circumstances the defendant could be again put upon his trial. On the part of the defendant it was contended that he could not, among other reasons, because the Constitution of the United States had declared, "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb;" and that putting the party upon trial was putting him in jeopardy of life and limb. The argument on the other side was, that this clause did not apply to State courts; and if it did, it was inapplicable to the cause, for if the cause was sent to another jury, the defendant would not be twice in jeopardy, nor twice tried, for there never had been a trial, in which the merits had been decided on. The Court inclined to the opinion that the clause was operative upon the State courts;

but at all events that it was a sound and fundamental principle of the common law, that the true meaning of the clause was that no man shall be *twice tried* for the same offence; that the true test by which to decide the point, whether tried or not, is by the plea of *autre foits acquit*, or *autre foits convict*; and, finally, (what is more direct to the present purpose), that in a legal sense "a defendant is not once put in jeopardy until the verdict is rendered for or against him, and if for or against him he can never be drawn in question again for the same offence." And the Court accordingly held that the discharge of the jury before giving a verdict was no bar to another trial of the defendant.

Soon afterwards, (in 1822), the same question occurred in Pennsylvania, before the Supreme Court of that State, in the case of *The Commonwealth* v. *Cook*, (6 Serg. & R. 577); and what makes it still more direct, as an authority, there is a provision in the State Constitution of Pennsylvania exactly like that in the Constitution of the United States. The Court held that the discharge of the jury, because they could not agree, was unlawful, and was not a case of necessity within the meaning of the rule on the subject. Mr. Chief Justice *Tilghman* on that occasion said, where a party "is tried and acquitted on a bad indictment, he may be tried again, because his life was not in jeopardy. The Court could not have given judgment against him, if he had been convicted. But where the indictment is good, and the jury are charged with the prisoner, his life is undoubtedly in jeopardy during their deliberation." "I grant that in case of necessity they (the jury) may be discharged; but if there be any thing short of absolute necessity, how can the Court, without violating the Constitution, take from the prisoner his right to have the jury kept together until they have agreed, so that he may not be put in jeopardy a second time?" So that the opinion of the learned Chief Justice, *à fortiori*, manifestly is, that if a verdict has been once regularly given upon a good indictment, the prisoner could not be tried again. Mr. Justice

Duncan was still more full upon the point. After adverting to the case of *The People* v. *Goodwin*, and the construction there given to the clause now under consideration, he said, "I feel a strong conviction that the construction here [there] given to this provision of the Constitution of the United States, engrafted into the Constitutions of Delaware, Kentucky, and Tennessee, and made an article in the Bill of Rights of this State, is not the true one, and that the provision that no person can be put twice in jeopardy of life and limb, means something more than that he shall not be twice *tried* for the same offence. It is borrowed from the common law; and a solemn construction it had received in the courts of common law ought to be given to it," &c. "This is not the signification of the words used in their common use nor in their grammatical or legal sense. 'Twice put in jeopardy,' and 'twice put on trial,' convey to the plainest understanding different ideas, &c." "There is a wide difference between a verdict given and jeopardy of a verdict. Hazard, peril, danger of a verdict, cannot mean a verdict given. Whenever the jury are charged with a prisoner, where the offence is punishable by death, and the indictment is not defective, he is in jeopardy of life." And he accordingly held, that in that case the jury, having been discharged, without giving any verdict, for an unjustifiable cause and without necessity, the prisoner was not liable to be tried again. And here I might repeat, *à fortiori*, if the jury had given a verdict he could not be tried again.

The same question came before the Supreme Court of North Carolina, in *The State* v. *Garrigues*, (1 Hayw. R. 241), and very recently again (in 1828) in the *matter of Spier*, (1 Dever. R. 491), before the same Court, where the jury in a capital case had been discharged without legal necessity and had given no verdict. The Court held that the prisoner could not be again tried. Upon this occasion the cases in the Supreme Courts of Massachusetts, New York, and Pennsylvania were cited; and the Court adopted that of the Supreme Court of Pennsylvania;

and affirmed the exposition of the clause given by that Court, that no man shall be twice put in jeopardy, &c. for the same offence. Mr. Justice *Hall* said, "when the jury were thus charged with the prisoner he certainly stood upon his trial; his life was jeopardized;" and he afterwards proceeded to the exceptions of a discharge from necessity, and when the indictment is bad. Mr. Chief Justice *Taylor* delivered a more elaborate opinion, insisting that "twice put in jeopardy," and "twice put on trial," convey to the mind several and distinct meanings; for we can readily understand how a person has been in jeopardy, upon whose case the jury have not passed. The danger and peril of a verdict do not relate to a verdict given. When the jury are impannelled upon the trial of a person for a capital offence, and the indictment is not defective, his life is in peril or jeopardy, and continues so throughout the trial.

Now, whatever diversity of opinion there may be among these learned Judges as to the right and power of the Court to discharge the jury in a capital case from giving any verdict, except in cases of extreme necessity, all of them agree in this, that after a verdict once given by the jury in a capital case, upon a good indictment, the party cannot be again tried for the same offence; and that such an attempt would be a violation of the Constitution of the United States. The judges in Pennsylvania and North Carolina go farther, and deem the case within the prohibition of the Constitution, if the party is once put upon trial before a jury, and the jury is discharged without giving a verdict, except in cases of extreme necessity.

Upon the question of discharging a jury in capital cases, the Supreme Court of the United States have in the case of *United States* v. *Perez*, (9 Wheaton R. 579), adopted the doctrine of the Supreme Court of New York. Upon that occasion the Court did not go into any exposition of the clause in the Constitution now under consideration; but simply stated that in the case of Perez, the prisoner had not been convicted or acquitted,

and therefore might again be put upon his defence. But I think I may say, that it was never for a moment at that time understood by the Court, that if there had been a *verdict* of conviction or acquittal, the prisoner could be again tried for the same offence. The point was not before the Court, and was not at all examined.

In the very recent case of *The People* v. *Comstock*, (8 Wend. R. 549), the Supreme Court of New York treated it as perfectly certain and settled "that in offences greater than misdemeanors, a new trial cannot be granted on the merits, even where the prisoner has been convicted;" and the Court placed the doctrine upon the same basis on which the English cases already cited have put it. I am not unaware that there is some general language attributed to the Court in *The People* v. *Stone*, (5 Wend. R. 36), which may bear a different interpretation. But it was a mere *obiter dictum*, and stands overruled by the later and more exactly considered cases.

Now, in the face of these authorities bearing directly on the point, and in which the interpretation of the clause of the Constitution was before the Court, I confess myself greatly distressed in attempting to give a different interpretation, without reducing the words to an unmeaning formulary, *vox et præterea nihil*. I find that my brother, the late Mr. Justice *Washington*, in the case of *United States* v. *Haskell*, (4 Wash. Cir. R. 402), where a jury had been discharged in a capital case, before verdict, on account of the insanity of one of the jurymen, held that there might be a new trial; and that the discharge was no bar to a further prosecution—upon that occasion, he said that the jeopardy spoken of in this article can be interpreted to mean nothing short of the acquittal or conviction of the prisoner, and *the judgment of the Court thereon*. And he asserted this to be the meaning affixed to the expression of the common law. Upon this I should greatly doubt as a doctrine universally true, especially when I find that it differs from the doctrine maintained by

Mr. Justice *Blackstone* in his Commentaries, (4 Comm. 336), as well as in some other authorities;[1] for, then, there would be no distinction between the plea of *autre foits convict* and the plea of *autre foits attaint*, of the same offence; and yet a distinction is manifestly maintained between them. And if it were even true that the plea of *autre foits acquit* or *autre foits convict* without a judgment, could not be pleaded technically as a bar to another prosecution or another indictment, it would not follow that it might not be a good bar to a new trial upon the same indictment, when there had already been one trial regularly had upon the ground of the maxim already adverted to; for upon the first trial the life of the prisoner was certainly in jeopardy. Mr. Justice *Washington* afterwards says, that the article does not apply to a jeopardy short of a *conviction;* which may be true, if we are to understand by conviction (as is certainly the legal sense), a verdict against or confession by the party of record.[2] But what with me is decisive against the construction of the clause of the Constitution given by Mr. Justice *Washington* is, that he puts it as clear upon his interpretation, that after a verdict of acquittal in a capital case (upon a good indictment) the Court might still award a new trial against the prisoner. And he puts the case (to illustrate this doctrine) of an acquittal of the prisoner procured by his own fraud. Now, I am not aware that the maxim has ever received such an interpretation from any other judge; and all the authorities which I have seen are against it. I confess my extreme repugnance to adopt any interpretation of the maxim, which shall lead to such consequences. It would remove the whole force of the prohibition,

[1] See on this subject, Vaux's Case, 4 Co. R. 44, 45. Wigg's Case, 4 Co. R. 45, 46. 2 Hawk. P. C. ch. 36, s. 13, s. 14, s. 19. But see 2 Hale P. C. ch. 32, p. 251; ch. 55, p. 391; ch. 31, p. 243.

[2] See 4 Black. Comm. 362. And 4 Co. R. 46. 2 Hawk. P. C. ch. 36, s. 9. 1 Chitty, Crim. Law, 462, (2d London edit.)

and submit the whole subject in criminal trials to the discretion of the Court. I have always understood that the great object of this clause was, on the contrary, to take away all discretion, and to forbid all Courts of the United States from trying a man twice upon a good indictment for the same offence.

It has been supposed that in all cases of conviction there may be ground to grant a new trial, because it will always be in favor of the prisoner. If this were true, the difficulty would still remain, that the Constitution does not provide for a new trial only where it is favorable to the prisoner. If the twice being put in jeopardy is referrible only to cases after judgment, and not after verdict; and before judgment, even a new trial may be granted, though it may be unfavorable to him. Cases of conviction may readily be conceived, in which a new trial may be injurious to the prisoner. If, after conviction, it may be granted at his request, it may also be granted without his consent. Suppose a man indicted for murder and convicted of manslaughter; can a new trial be granted at all, unless by putting him twice in jeopardy of his life? Suppose a robbery of the mail, charged in the indictment with being effected by wounding the carrier, or putting his life in jeopardy (which is a capital offence) and there is a conviction of the robbery without such aggravated circumstances, can a new trial be granted, upon the application of the government or of the prisoner? Many other cases of a like nature may be easily put, where the offence in an aggravated form is a capital felony, and without such aggravations not. Yet the power to grant a new trial in cases of conviction, if it exists at all, is general, and may be required by the government as well as by the prisoner.

Upon the whole, having given this subject the fullest consideration, I am, upon the most mature deliberation, of opinion that this Court does not possess the power to grant a new trial, in a case of a good indictment, after a trial by a competent and regular jury, whether there be a verdict of acquittal or conviction.

My judgment is, that the words in the Constitution, "Nor shall any person be subject, for the same offence, to be twice put in jeopardy of life or limb," mean that no person shall be tried a second time for the same offence, where a verdict has been already given by a jury. The party tried is in a legal sense, as well as in common sense, in jeopardy of his life, when a lawful jury have once had charge of his offence as a capital offence upon a good indictment, and have delivered themselves of the charge by a verdict. In this respect I follow the doctrine of the Supreme Court of New York; and the doctrine of the Supreme Court of Pennsylvania and North Carolina goes not only to the same extent, but includes cases where the party is once put upon his trial before the jury, and they are discharged from giving a verdict without extreme necessity. This too is the clear, determinate and well settled doctrine of the common law, acting upon the same principle, as a fundamental rule of criminal jurisprudence. I deem it a privilege of inestimable value to the citizen; and that it was introduced into the Constitution upon the soundest principles of prudence and justice. But if it were otherwise, it is my duty to administer the Constitution as it stands and not to incorporate new provisions into it. If this clause does not prohibit a new trial, where there has already been a regular trial and verdict, then it is wholly immaterial whether the verdict is of acquittal or of conviction of the offence; and the same party may, in the discretion of the Court, be put upon his trial ten, nay, twenty times, if the Court should deem it fit. It was (as I think) among other things, to get rid of the terrible precedents on this subject alluded to by Lord *Hale*, and even acted upon by him, in the reign of Charles II., in discharging juries from giving verdicts upon frivolous or oppressive suggestions, that this great maxim of the common law was engrafted into the Constitution. The Constitution has also in another clause declared, that "no fact once tried by a jury shall be otherwise re-examined in any Court of the United

States, than according to the rules of the common law." The only modes of making this re-examination known to the common law, are by a writ of error and a new trial, and if by the common law there cannot be a new trial in a capital case, after a regular trial once had upon a good indictment, as seems to me to be conclusively established by the English authorities already cited, then this clause also carries in its bosom another virtual prohibition.

Lest I should be thought to have overlooked the case of *United States* v. *Daniel*, (6 Wheaton R. 542), where the Circuit Court divided upon the motion for a new trial, I beg only to say that the point whether the Circuit Court had jurisdiction to grant a new trial in a capital case, was not before the Court. It was a mere certificate of division of opinion of the Circuit Court; and the Supreme Court held that it had no jurisdiction to entertain the point certified, so far as it regarded a new trial.

If the language used by me in the Commentaries on the Constitution (3 Story Comm. on the Const. ch. 38, s. 178), should be thought to inculcate a different doctrine, I can only say that I do not so understand it. I have no doubt that there are cases where there may be a new trial; as in cases of a mis-trial by an improper jury.[1] But in the language there used, it should be considered that the author was not summing up his own private or judicial opinions, but only gathering together the opinions of others, which had come to his knowledge, to illustrate the text. But if there be any erroneous opinions inculcated in those Commentaries, which upon more deliberate examination I should deem unfounded, I trust that I shall be the last person to insist upon them as obligatory or correct. My duty as a Judge, is to pronounce such a judgment as my conscience dictates, without reference to any preconceived opinions. But I freely admit

[1] See *The People* v. *Kay*, 18 John. R. 212; 2 Hawk. b. ii. ch. 36, s. 15. *Rex* v. *Kerle*, 1 Lord Raym. R. 139; 2 Hawk. P. C. ch. 27, s. 104; Id. ch. 47, s. 12. Arundell's Case, 6 Co. R. 14.

that I see nothing in that passage of the Commentaries, so far as relates to the granting of new trials, which I deem incorrect, or which I wish to retract.

It may be thought by some, that there may be great inconvenience in the establishment of this doctrine. But if there be, it is for those who possess the power to amend the Constitution to apply the proper remedy. For myself, I entertain great doubts whether, in the actual administration of public justice, the present doctrine would not be far more safe and useful than an unlimited power to grant new trials in all capital cases, at the mere discretion of the Court. It may be, that a Court may sometimes err in the proper administration of the law; and it may also err in granting or refusing a new trial. But the consciousness that the trial is final, will always impress every Court, mindful of its duty, with the utmost caution in all its opinions and judgments in capital cases, where the result may be unfavorable to the prisoner. It will naturally induce it to lean to the side of mercy; and it will look anxiously to the dictates of the law. But still if, after all, errors should intervene, it will be but the common infirmity of the administration of all human justice. And the prisoner, even in such a case, will not be wholly without redress. He may apply for a pardon or mitigation of the sentence, to the Executive; and it cannot be doubted that the Court itself, if conscious of any serious error, would cheerfully aid in his application. Hitherto this ultimate appeal to the pardoning power has been deemed satisfactory and safe in the land of our ancestors down to our own age; and it has been deemed equally satisfactory and safe in all those States whose jurisprudence does not permit a new trial in capital cases under like circumstances.

But whatever might be my opinion as to the authority of this Court to grant a new trial in capital cases generally, I shall, under the present circumstances go over all the grounds insisted upon by the prisoners' counsel (some of which being in arrest

of judgment, are indispensable to be disposed of before judgment,) because if any error in point of law has been committed by the Court, injurious to the prisoners, or upon established principles of law, they ought (if the Court could grant it) to have a new trial, I should feel it my duty to make a direct application in their behalf to the Executive for a pardon, to redress the error. God forbid that any man in this country should suffer death against the law, from the mere infirmity of judgment of those who are appointed to preside at his trial.

The first cause assigned for a new trial is, the discovery of new evidence. For the present I shall pass over this point, intending to examine it when all the other grounds shall have been passed under review.

The second cause is, that the prisoners were not permitted to be tried separately, although they made a motion for this purpose. Now, this has been long since settled by the Supreme Court of the United States to be a matter, not of right, but of sound discretion to be exercised by the Court. So it was held in the case of *United States* v. *Marchant*, (12 Wheaton R. 480), upon the fullest consideration. The sole ground upon which the present motion was made, was that by means of separate trials, the prisoners wished and intended to make use of the testimony of each other in their defence. Now I was of opinion, and still am, that the reason assigned was wholly, in a legal point of view, inadequate to justify the Court in the exercise of such a discretion. The charge was a charge of a joint piracy on the high seas, committed by all the prisoners, found by the Grand Jury upon their oaths, and therefore to be taken *primâ facie* to be well supported by competent evidence before them. There is no pretence now to say, when the trial has been had, that there was not a solid ground of probable cause to put all the prisoners in the indictment as confederates in the act, or that any of the prisoners were included upon mere false suggestions, to evade their testimony. It is clear by law that con-

federates in the same piracy, put upon trial at the same time, are not competent witnesses for each other. And I do exceedingly doubt whether in point of law the Court possess the right to make witnesses competent in a trial by any act of their own, who would otherwise be incompetent. The Government has rights as well as the prisoners. The Government is not to be deprived of its rights merely because the prisoners request a separate trial. In a joint trial the Government has a right to exclude all the prisoners from being witnesses. If the Court deprive the Government of this right, it is an exercise of power which may sometimes subvert the purposes of justice. It certainly does not necessarily promote it. It is no just cause of complaint on the part of prisoners, that they stand jointly indicted: for they can rarely be so, except where they have mixed themselves up with the criminal transaction in a manner which in the sober judgment of the Grand Jury implicates them in the common guilt. I have never before known a case, in which the sole ground for a separate trial has been to make the witnesses competent for each other. In the only cases in the Circuit Court in which a separate trial has been granted, there has been an express disclaimer of using the confederates as witnesses; and the defence has been exclusively placed upon several and distinct grounds. In the present case the main argument was at the trial, and now is rested upon a defence common to all the prisoners, viz. that the robbery was not by the Panda or her crew; but by some other vessel. If, therefore, the question were now to be decided over again, I should, under the circumstances, refuse to concur in a separate trial of the prisoners. I should doubt the legal right so to do, for the cause assigned. And I cannot but think that the granting it in a case of this sort (in which, if in any case, there ought to be a joint trial,) would be an abuse, and not a just use of a sound discretion.

The third, fourth and fifth causes embrace in different forms the same subject matter. The prisoners, who are all foreigners

and strangers to our institutions, and do not, as far as we know, speak or understand the English language, and with whom the Court could communicate only by an interpreter, were, after the indictment was found against them, brought into court and were informed that they were entitled to copies of the indictment, and should be furnished with them two full days before they were required to plead; that they were entitled to counsel to assist them in the defence, and that the Court would assign such counsel as they desired,—and accordingly the learned gentlemen, who have since conducted the defence, were so assigned; and that at a subsequent time, after two full days, they would be arraigned and required to plead to the indictment. Accordingly, after this period had elapsed and the copies were duly furnished, the prisoners were brought to the bar, and in the presence of their counsel were arraigned, and upon their arraignment they severally pleaded Not guilty. But, as is said, the Clerk of the Court upon this arraignment did not further proceed, upon their pleading not guilty, to ask the prisoners how they would be tried, so that they did not make the usual and common reply, "By God and the country." The District Attorney then moved the Court to assign a time for the trial of the prisoners, and accordingly, at the request of the prisoners' counsel, a particular day, named by themselves, was assigned for the trial. It was then stated to the prisoners, that they were to be tried by a jury, that the list of the jurors would be furnished to each of them (and they were accordingly furnished) two full days before the trial, that they might exercise their full right of challenge. Accordingly at the time assigned, the prisoners were brought to the bar for trial; they were then distinctly and in the usual manner informed by the clerk, that they were then set at the bar to be tried, and that the good men and true, whom he was then to call, were to pass between them and the United States at the trial; and that if they would object to any of them, they must do it as they were called and before they were sworn.

The jury were accordingly called, and not the slightest objection to the trial by the jury was intimated, either by the prisoners or their counsel; but the prisoners proceeded, with the assistance of counsel, to make their challenges, (amounting, I believe, in all, to thirty-six), and all the jurors sworn and impannelled were those to whom they declared that they had no objection. The whole cause was then most elaborately examined and heard; the fullest defence made; and the jury returned their verdict, as it appears upon the record.

Now, the objection is, not that no *similiter* is joined (for it is admitted that this is not necessary) but that there is no issue to the country, until the prisoners have expressly put themselves, by the words already quoted, "upon God and the country;" and that until such an issue there can be no trial. In order fully to understand the nature of the objection it may be well to state the course of the proceedings at the common law in England; and this may be taken from the very ample account given by Mr. Justice *Blackstone* in his Commentaries, (4 Comm. ch. 25, p. 322 to 331. Id. ch. 26, p. 332 to 341).[1] When the prisoner is brought into Court to answer the indictment, he is said to be brought in to be arraigned thereon; for "to arraign is nothing else but to call the prisoner to the bar of the Court, to answer the matter charged upon him by the indictment." The indictment is then read to him, and when called upon to answer, he either stands mute or confesses the fact (which we may call incidents to the arraignment), or else he pleads to the indictment. Regularly a prisoner is said to stand mute upon being arraigned upon a capital felony, when he either (1) makes no answer at all; or (2) answers foreign to the purpose or with such matter as is not allowable, and will not answer otherwise; or (3) (what is most material to the present purpose) upon having pleaded not guilty, refuses to put himself upon the country.

[1] See also 2 Hale P. C. ch. 43, 314 to 322. Id. ch. 28, p. 216 to 225.

If he says nothing, the Court ought *ex officio* to impannel a jury to inquire, whether he stands obstinately mute, or whether he be dumb *ex visitatione Dei*. If the latter is the case the Court proceed to the trial, and examine all the points, as if he had pleaded not guilty. If he be found obstinately mute, in cases of treason and petit larceny and misdemeanors, his standing mute was deemed equivalent to a conviction, and he received the same judgment and execution. In other capital felonies the prisoner was not anciently deemed convicted, but for his obstinacy he received the terrible sentence of penance, or *peine forte et dure* (as it was called) which in substance was, that he was put into a low dark chamber, laid on his back naked, and a weight of iron, as great as he could bear, placed on his body; he was to have no sustenance save only on one day three morsels of the worst bread, and on the second day three draughts of standing water that should be nearest to the prison door; and in this situation this should alternately be his diet till *he died*. And this remained the law in England, though rarely put in force, until the 12 Geo. 3, ch. 20, when it was enacted that all persons who should stand mute on being arraigned for felony or piracy, should be deemed convicted of the offence and punished accordingly.

We next come to consider the general issue, as it is called, which is the plea of not guilty. When upon his arraignment the prisoner pleaded not guilty, the Clerk immediately enters upon the record not guilty, or as it stood anciently abbreviated, *non cul:* for *non culpabilis;* and immediately the reply of the government, supposed to be [1] given *viva voce*, that the prisoner is guilty (and by *Blackstone* supposed to be indicated by the abbreviation *cul: prit*); though in point of fact such reply is never formally made. When this is done, issue is then said to be joined; for Mr. Justice *Blackstone* informs us, that "imme-

[1] Mr. Christian's account in his note to 4 Black. Comm. 340, Note (1), appears to me far more probable than that of Mr. J. *Blackstone*.

diately upon issue joined it is inquired of the prisoner, by what trial he will make his innocence appear," which the Clerk does by the words, "How wilt thou be tried." And indeed this must necessarily be so, for until an issue is virtually joined between the parties, there is nothing to be tried, and of course there can be no trial, until something is to be tried. And the question propounded becomes thus intelligible. So that the remark of the District Attorney is critically correct, that there is a joinder of the issue, before we arrive at this stage of the arraignment.[1] In order to ascertain why this inquiry is made, it is necessary to state that anciently in England the party accused had his choice of being tried in one of two manners, by battel, or by a jury. And in those times of course it was indispensable that he should be put to his election. If he chose the trial by battel, he was accustomed to say that he would be tried by God; if by a jury, that he would be tried by the country. But since the trial by battel was abolished (as it has been for ages upon indictments), there can be no trial but by a jury; and hence in England, where the old form was still retained, the refusal to answer that he would be tried by God and the country was treated as a refusal to put himself upon the inquest in the usual manner, and therefore as legally standing mute. Now in America, the trial by battel was never introduced at all; and the only trial since the first settlement of the country has always, in criminal cases, been by a jury; and could not be in any other manner. But in England the right of trial by battel in certain cases continued down to our own day, viz. in cases of appeals and approvements; and as late as the case of *Ashford* v. *Thornton* (1 Barn. and Ald. R. 405) in 1818, was acted upon, though it has been since abolished by a recent statute. The continuation of the form in England may thus be easily accounted for; and though in America it has very probably been acted upon in

[1] See 1 Chitty, Crim. Law, 416.

many States, it would be proper only, where the common law rule that the party might otherwise be deemed to stand mute, was in force; for I believe that the punishment of *peine forte et dure*, never was adopted in any part of America. And it seems to me, that in all those States, where the Constitution provides that the trial of all crimes shall be by a jury, and the prisoner pleads not guilty, it is a mere mockery to ask him how he will be tried, for the Constitution has already declared how it shall be.

But be this as it may under the state governments, I am clearly of opinion, that the form is wholly unnecessary under the Constitution and laws of the United States in the federal Courts. The Constitution has expressly declared, "that the trial of all crimes except in cases of impeachment shall be by jury." It is imperative upon the Courts, and prisoners can be lawfully tried in no other manner. As soon, therefore, as it judicially appears of record that the party has pleaded not guilty, there is an issue in a criminal case, which the Court are bound to direct to be tried by a jury. The plea of not guilty does import of itself a tender of a proper issue, and the Attorney for the Government, in demanding a trial of that issue, necessarily requires it to be by a jury. And so in point of fact, the plea of not guilty is always understood by the Court. When the Clerk enters it upon record, in making up the record he usually adds to it; and of this he (the prisoner) puts himself upon the country. And in misdemeanors this is the common course in England. And why? Plainly because in the case of a misdemeanor there never could be any other trial than by jury; and therefore, in cases of misdemeanor the prisoner never is asked, "How he will be tried;" but his plea of not guilty is of itself an issue to the country. The laws of the United States establish this to be the true view of the matter, at least in the courts of the United States. The Crimes act of 1790, ch. 9, s. 30, provides that if any person shall be indicted for treason,

and shall stand mute or refuse to plead, or shall challenge peremptorily above thirty-five of the jury; or if any person be indicted of any other capital offence, &c., if he shall stand mute or will not answer to the indictment, or challenge peremptorily above twenty of the jury, the Court in any of these cases, shall, notwithstanding, proceed to the trial of such person, as if he had pleaded not guilty, and render judgment thereon accordingly. And the act of 1825, ch. 276, s. 14, provides the like rule in regard to offences not capital, declaring that in such cases the Court shall proceed to the trial of such person as if he had pleaded not guilty, and upon the verdict render judgment accordingly. Both of these statutes clearly establish that the party is not to be understood to stand mute, when he has pleaded not guilty; and that as soon as the plea of not guilty is put in, the cause must be tried by the jury. It is impossible, consistently with the language of these acts, for the Court to adjudge that the party stands mute, when he pleads not guilty; and if he does not, in contemplation of law, stand mute after such plea, then the plea of not guilty includes every thing essential to put him on trial by the jury.

It ought to be added, that the present, being a charge of piracy on the high seas, was not originally or practically within the ancient rules of proceedings at the common law on land. On the contrary until the statute of 28 Henry 8, ch. 13, piracies on the high seas were exclusively triable in the Admiralty according to the course of the civil law; and that statute first made them triable by a jury in the common form of jury trials.[1] So that the trial by battel was never applied to them; nor until the statute of Henry 8, were the forms of arraignment consequent thereon at the common law.

Besides:—What is the reason, even at the common law, of asking the prisoner how he will be tried? It is to ascertain

[1] 4 Black. Comm. 71, 269. 1 Hawk. P. C. b. i. ch. 20, s. 17, 18.

whether he consents to a trial by jury. If he does consent in any clear and determinate manner, it is manifest that he cannot object that the form has not been gone through, if the substance has been preserved. Now, in the present case there is the most ample proof of a consent, if consent were necessary, by the acts of the prisoners, and of their counsel before and at the trial. And if the prisoners had refused to consent, the trial must have been in the same manner precisely as it has been had. But I confess for one, that I deem it a little short of an absurdity in the Courts of the United States to call upon the prisoners, after they have pleaded not guilty, to say how they will be tried, when the constitution and laws have peremptorily required the trial to be by jury. Suppose the prisoners had been asked, how they would be tried, and they had answered that they wished for no trial at all; must not the Court have proceeded to try them upon the plea of not guilty? Suppose they had answered that they wished to be tried by the Court, could the Court have tried the cause otherwise than by jury? Suppose they had been silent as to how, and when, and whether, they should be tried, could the Court have done otherwise than order a trial by jury? We have no authority to inflict the punishment of the *peine forte et dure* (and I trust our courts never will have it), and our laws manifestly contemplate no such thing as either legal or necessary. It appears that by a recent statute in England (Stat. 8 Geo. 4. ch 28) it is provided that, if a person being arraigned upon an indictment for treason, felony, or piracy, shall plead thereto a plea of not guilty, he shall by such plea, without further form, be deemed to have put himself upon the country for trial. And this is precisely what our laws, in my judgment, do in effect prescribe. The provision was indispensable in England, since the refusal of the prisoner to state, after he had pleaded not guilty, how he would be tried, was deemed in law as standing mute. In our law he cannot be deemed to stand mute, when he has pleaded not guilty. The constitution de-

cides how he shall be tried, independent of any election on his part. The plea of not guilty puts the party for all purposes upon his trial by jury. My judgment, therefore, is that there is nothing in this objection.

The sixth cause respects the overruling by the court of a question asked by the prisoners' counsel, the relevancy of which was not perceived by the Court, and the counsel refused to state it. The fact afterwards came out (I believe) incidentally upon the answer to other questions. But at all events, the relevancy of the question not having been shown at the time (and indeed not even now at the argument), it is clear that there is no ground to say that it ought to have been put. It would otherwise happen, that the right of cross-examination might extend to every thing, whether it were material or immaterial, which had occurred in the whole course of the witness's life.

The seventh objection relates to certain supposed errors in the instruction of the Court. The first specification respects the supposed remark of the Court that Perez was not an accomplice. What the Court actually said was this—After stating to the jury that a conviction ought not to be upon the naked testimony of an accomplice, unless strongly corroborated by other evidence or circumstances; the Court said, that it was not to be taken as a matter of course that Perez was an accomplice. That was for the jury to consider. Perez, in his testimony, utterly denied that he was an accomplice; the defence was, that the crime was never committed by any of the crew of the Panda; and if the crime never was committed at all, Perez could not be an accomplice. The government alone insisted that Perez was an accomplice. And under these circumstances, the jury were to say, whether he was an accomplice or not, upon the evidence. It is now argued (as I understand it), that Perez might have been an accomplice, although the crime was never committed. This appears to me, in point of law, wholly unmaintainable—and at all events, the Court left the matter to the jury upon the

whole facts, exactly as the evidence and circumstances placed it before them.

The next specification is to the supposed instruction of the Court, as to the effect of the non-production of the written examinations, under the circumstances. These circumstances took place in the presence of the Court and jury. The counsel for the prisoners made a written demand of the District Attorney to produce the examinations of Perez and several of the prisoners taken at Fernando Po; the District Attorney offered to produce them, if the prisoners would read them, or suffer them to be read, to the jury. The counsel for the prisoners declined to receive them upon that condition. But they afterwards stated that the District Attorney might, if he chose, read them to the jury, as papers produced by him; and they would waive any objection to the examination of Perez being under oath. The District Attorney declined so doing, saying he was not in the habit of using the confessions of prisoners against them. Such was the substance of the proceedings—and the Court were asked, under these circumstances, to instruct the jury that the suppression of the examination of Perez by the District Attorney, afforded a legal presumption, that if produced, that examination would be unfavorable to the credit of Perez. Whether the District Attorney was right or not in insisting upon the withholding of the examinations, unless upon the terms proposed by himself; and whether the counsel for the prisoners were discreet or not in their offer, which was not accepted, are matters with which the Court had nothing to do, and upon which they were not bound to express any opinion; and with which I do not now intermeddle, for they are matters properly resting in the discretion of the counsel on each side. But the Court left the whole matter to the jury, instructing them that they might draw such inferences from the circumstances, in evidence, as they pleased, and which were warranted by them, provided they were not unfavorable to any of the prisoners—and that they ought not to

presume any thing from these circumstances against the prisoners. In this instruction I cannot now perceive any thing objectionable. And I know not how, consistently with the rules of law, the Court could have told the jury that the circumstances afforded a *legal* presumption against the credit of Perez.

Another specification is the supposed instruction of the Court as to Captain Trotter's liability for loss and damages occasioned by the capture of the Panda. At the trial a vast deal of argument was urged to the jury by the closing counsel for the prisoners, to establish gross misconduct on the part of Captain Trotter, and his liability to losses and damages for his acts; and thus to found imputations that he had a vital interest in this prosecution, and to influence the testimony of the witnesses. And upon the present motion, the same line of argument has been with even more zeal and earnestness pressed upon the Court. At the trial the Court said, that they did not perceive that these charges were made out by the evidence, but of that the jury would judge for themselves. But that the guilt or innocence of the prisoners at the bar did not depend upon the good conduct or malconduct of Captain Trotter. That Captain Trotter may have conducted himself incorrectly, and yet the prisoners may be guilty. And on the other hand, he may have had probable cause for the capture, and have acted *bona fide*, and with the most correct intentions, and yet the prisoners may be innocent. This instruction I then thought, and still think, entirely correct; and I cannot think that it was at all injurious to the prisoners.

Another specification is the supposed instruction of the Court that certain confessions of the prisoners were proper for the consideration of the jury. It is to be observed, that none of these confessions were brought out by the District Attorney against the prisoners upon the direct examination of the witnesses—but they were all brought out upon the cross-examination of the prisoners' own counsel. The Court stated to the

jury that these confessions were not to be viewed in any different light from their coming out upon the cross-examination, from what they would be, if they had come out upon the direct examination. But that these confessions, so far as they were not reduced to writing, were in the case, and were to be considered by the jury. And afterwards, upon the suggestion of the prisoners' counsel (whether rightly or not I do not now say in point of law) that the confessions, reduced to writing, and not now produced, ought to be disregarded by them, although they came out upon direct interrogatories of the cross examining counsel. In this instruction I can as yet perceive no error; though I confess that upon farther reflection, I do doubt, whether, *under all the circumstances* of the case, the Court were right in directing the jury to disregard the confessions of the prisoners which were reduced to writing and not produced. But if there was any error in this direction, it was manifestly favorable to the prisoners.

The next specification referred to the same matter of the suppression of the said written examinations and confessions of the prisoners by the District Attorney, under the circumstances above-mentioned, and called upon the Court to instruct the jury, that, under the circumstances, the suppression of these writings afforded a *legal* presumption that, if the same were brought forward, the effect thereof would be in favor of the prisoners. The Court left the matter at large to the jury, in the manner above-mentioned, as matter of fact, and presumption of fact, to be weighed by the jury, but with the express direction that they ought not to presume any thing therefore unfavorable to the prisoners. There was no matter of presumption of law in the case, but of presumption of fact only; and I am entirely satisfied that the Court did all that it ought in law to have done in this direction.

The next specification is upon the same subject, and required the Court to decide, that the District Attorney ought to have

put these writings into the case, or the parol testimony of the same confessions, which had been proved to be reduced to writing, ought to have been wholly rejected, and considered out of the case. The Court did, under the circumstances (as above stated), direct the jury to disregard the parol testimony of any of the confessions which were reduced to writing. The District Attorney did offer to put these writings into the case, if the prisoners' counsel required him to do it. So that there is no legal ground of complaint on this head.

Another specification respects the confessions, stated to have been made by the witnesses, or one of them, of *some* of the prisoners at the bar, without naming them, being allowed to go as evidence to the jury. Now, the confessions thus referred to, were brought out upon pointed interrogatories in the cross-examination: and the counsel for the prisoners did not follow up the cross-examination, and ask who the particular prisoners were. Upon examining my minutes of the testimony, I find that Domingo said, that he heard some of the crew confess to the captain of an English brig, that they had robbed an American brig. They had a Portuguese interpreter, who spoke English and Portuguese. The first five that were captured, confessed. Some of them are here. He afterwards stated, that some of them were examined on board, and some on shore, at Fernando Po; and he proceeded to give the names of those who confessed at Fernando Po, viz., Montenegro, Garcia, Castillo, Perez, Delgado, and Guzman. Now there was evidence, in other parts of the testimony, to show that the five who were first captured were Montenegro, Garcia, Castillo, Perez, and Delgado. Silveira (another witness), according to my minutes, testified to various confessions. Among others, he stated that he went in an English transport, with five others, viz. Delgado, Perez, Garcia, Montenegro, and Castillo, to Ascension; that some of the prisoners at the bar told him at Ascension, that they had robbed the Mexican. He stated, also, that they had con-

fessed it to him, not once or twice, but several times; that the three of the prisoners, who were present at the governor's house at Fernando Po, said they had robbed the Mexican; that the day before they denied it, but this last day they all confessed it, and laid the blame to the captain and officers; that the declarations at the governor's house were not taken down in writing. Now these are but a part of the confessions stated in the case, for Perez stated others; and the whole matter, as matter of evidence, was left to the jury under all the instructions in the case; and the Court instructed the jury on this point, that if the persons who made the confessions at any time were not identified, but the statement was only that some did, or three did confess, not being named, and not being identified, such confessions could not be applied to any of the prisoners in particular as proofs of his guilt; but the evidence under such circumstances being in the case, might be weighed by them, so far as it applied to the identification of the Panda as the vessel which committed the robbery of the Mexican. Upon the most mature reflection, I am not persuaded that there was any error in this instruction.

The next specification is, that the Court declined to instruct the jury, under the circumstances stated in the instruction prayed, that a *legal* presumption arose that the log-book of the Panda was taken at the same time and place, and by the same captors, and that they have it, or have destroyed it. Now, without dwelling upon the manifest impropriety of giving this instruction as asked, as it assumes certain facts, not admitted to be proved, the Court, in my judgment, would not have been justified in giving any such instruction as a matter of law. But the testimony, so far as there was any evidence on the point before the jury, positively denied any possession of the log-book by the captors; and Mr. Quentin directly stated, that it was not on board at the time when he boarded and captured the Panda; and that he never heard of its having been obtained afterwards. And there was not a tittle of proof upon the other side, that it

had come to the possession of the captors. The Court did, however, instruct the jury, that if they did believe that the log-book of the Panda had come to the possession or power of the captors, or of the government officers, their omission now to produce it was a circumstance unfavorable to the captors, and favorable to the prisoners. It appears to me that this was going to the extreme limits of the law in favor of the prisoners. The next specification being to the same point requires no further notice. The Court gave an instruction in favor of the prisoners, if the log-book was proved to be in the possession or power of the government prosecutors.

The next specification is, that the Court admitted parol evidence to establish the time of the sailing of the Panda on her voyage from Havana to Cape Mount, and to prove the course and termination of the voyage, without proving that the log-book was missing or lost. This objection is, as I understand it, founded upon the notion that the log-book is not only evidence of these facts, but the only proper evidence, and the best evidence, if it can be produced. I do not so understand the law. The log-book is in no just sense proof *per se* of the facts therein stated, except in certain cases provided for by statute. It is not evidence under oath. It does not import legal verity. It could not, if it had been produced by the prisoners, have been *per se* admitted, (if objected to) as evidence of the facts stated therein. It would be mere hearsay not under oath. It might be introduced against those of the prisoners, to whom it should be brought home as having a concern in writing or directing what should be contained therein, to contradict their statements or their defence. But I am yet to learn that parties can thus create evidence for themselves by inserting facts in a log-book. I know of no such rule of law; and no authorities are introduced to establish its existence. In the most common class of cases in which the log-book is used, those of insurance, the log-book has never, to my knowledge, been allowed (if objected to) as proof of

the loss for the assured. The officers or others of the crew, constantly prove all the facts by parol. The log-book is often called for by the underwriters to contradict their statements on the stand; or to control or weaken the influence of these statements.

The next specification is, that the Court declined to instruct the jury that under the circumstances proved, resistance, flight, or the destroying of the Panda by her officers and crew would be exercising the right of self-defence on the part of the said officers and crew. For myself, I confess that it is utterly inconceivable to me, how the Court could give any instruction in the manner required by this prayer. What were the circumstances? They were matters of fact to be ascertained and fixed by the jury. The Court could not affirm what they were, or, before they were ascertained, declare to what extent the right of resistance might go. The Court cannot judicially know why and wherefore the flight of the Panda's crew took place. It may conjecture that the jury have thought that it was occasioned by a fear of being captured, as pirates. But we cannot say so. Neither can we, nor could we at the trial say why it was done, or whether it was done for other justifiable reasons. It did not indeed appear from any evidence in the case, that there was any resistance to capture by the Panda's crew. And the defence expressly denied that there was any intention to blow up the vessel. On the contrary, an elaborate argument was introduced to establish the contrary. It is a little difficult, therefore, to see, why these ingredients should have been thought so essential to the merits of the case presented in behalf of the prisoners. But the Court left the whole matter to the jury; and stated that if the Panda's crew did believe and act upon the ground, that there was an intended hostile attack by public enemies or by pirates, their right of resistance and self-defence in any manner, which they might deem most beneficial, was not to be doubted. As I understood the application of the prisoners' counsel, the

Court enlarged the prayer from a mere *hostile* attack (which was supposed to mean an attack of public enemies) to an attack also by pirates. But in every view my opinion is that the Court stated the law correctly, and could not properly have gone farther.

The next and last specification under this head is, that the Court declined to instruct the jury that the failure of the government to produce the witness, who (it was testified) saw the match applied for the purpose of blowing up the Panda, and removed it, afforded a *legal* presumption against the truth of the alleged attempt by the prisoner, Ruiz, to destroy the Panda. Now it appears to me, that if there was any presumption at all to be drawn from this failure to produce the witness, it was a presumption of fact, and not a presumption of law; and as a presumption of fact, it was most strenuously urged to the jury by the prisoners' counsel. The argument now is, that although Mr. Quentin, who was upon the stand, stated that he was on board at the same time with the witness, that he saw the smoke coming from the cabin, and the absent witness go down, and bring up the match, and many other circumstances to establish an intention to set the Panda on fire and blow her up; yet that his testimony was not the best evidence on this point, and ought to be rejected; and not only so, but the failure to produce the witness afforded a legal presumption against the truth of the alleged attempt to destroy the Panda. It appears to me that the whole basis of the argument is founded upon a mistake of the meaning of the rule of law as to the production of the best evidence. The rule is not applied to evidence of the same nature and degree; but it is applied to reject secondary and inferior evidence in proof of a fact, which leaves evidence of a higher and superior nature behind, in the possession or power of the party. Thus, if the party offers a copy of a paper in evidence, when he has the original in his possession, the copy will be rejected, for the original is evidence of a higher nature. So, oral

testimony is inadmissible to prove the contents of a written instrument, when the paper is in the possession or power of the party; for it is not of so high a nature as the paper itself. But the rule does not apply to several eye witnesses testifying to the same facts, or parts of the same facts, for the testimony is all in the same degree; and where there are several eye witnesses to the same facts, they may be proved by the testimony of one only. All need not be produced. If they are not produced, the evidence may be less satisfactory or less conclusive; but still it is not incompetent. And to apply the principle to the present objection, Mr. Quentin was a competent witness to prove all the facts, which he knew, which went to establish an intention to blow up the Panda. That another witness might have proved more and other facts to the same purpose, which might have been more full and satisfactory and conclusive to the jury, does not render Mr. Quentin's testimony incompetent. The defects in the evidence, whatever they might be, are very proper matters of observation to the jury, to create doubts or justify disbelief of any intention to blow up the Panda. But the jury were to judge of all these matters in weighing the whole evidence on this particular point. A witness who has seen a party write several times is a good witness to prove his handwriting. But a clerk in the counting-room of the party, who has seen him write innumerable times, would be in many cases a more satisfactory witness to prove the handwriting. But nobody can doubt that each would be a competent witness of the facts within his knowledge to prove the handwriting.

Another cause assigned for a new trial is, that the jury were furnished with newspapers in their room, and did read them during the pendency of the trial; and subsequently another ground was added in a supplementary paper, that the jury drank ardent spirit while they had the cause in charge. It is important, to a right understanding of these objections, to state the real facts and circumstances attendant upon the trial. The trial

lasted, I believe, about fifteen days, during which time the jury were kept together night and day in the custody of officers. Some of them were engaged in very pressing business, which required them to communicate with friends respecting that business; and one or more of them was in ill health during the trial, and was obliged to have the aid of a physician. These circumstances were stated in open court, and it was agreed between the counsel in open court, that the jury might have all reasonable refreshments during the trial, that they might communicate on business with their friends, and write and receive papers from their friends on business, the papers being previously examined, and the conversation witnessed and heard by one or more of the officers of the Court. And the Court requested the jury during the trial, and until the arguments were heard and the charge given, not to converse with each other on the subject of the trial, in order to keep their minds open to the last moment to all the merits of the cause. While the jury were thus kept together, they were allowed by the officers of the Court attending them, to read the public newspapers, the officers first inspecting them and cutting out every thing that in any manner related to the trial. And it now appears, as well from the affidavits of the officers, as from the affidavits of the jurymen, that in point of fact they never saw any thing in any newspaper relative to the trial. The officers granted the indulgence to read the newspapers, under a mere mistake of their duty, and as soon as the charge was given by the Court, the jury were not allowed to see any newspaper, until after they had delivered their verdict in open court. So far, then, as reading the newspapers went, there is not the slightest reason to believe that it could or did in fact in any manner whatsoever affect the verdict or influence the jury. The evidence, as far as it bears on the point, negatives any supposition of this sort. And, speaking for myself, I must say that considering the protracted nature of the trial, and the necessary privations of the jury, and

the importance of keeping them when out of court from too constant meditation upon the subject of the trial while it was yet imperfectly before them, I do not doubt, that the indulgence had a tendency to tranquillize their minds, and to keep them in a state of calmness and freedom from anxiety highly favorable and useful to the prisoners themselves. Without doubt it was a great irregularity in the officers of the Court, for which they may be punishable, to have granted this indulgence without the express sanction of the counsel or of the Court. I am not aware that any such sanction was given. But it is not every irregularity of officers, which would justify a Court in setting aside a verdict and granting a new trial, or treating the matter as a mis-trial. The Court must clearly see that it is an irregularity, which goes to the merits of the trial, or justly leads to the suspicion of improper influence, or effect, on the conduct or acts of the jurors. We must take things as they are in our days. Juries cannot now, as in former ages, be kept in capital cases upon bread and water, and shut up in a sort of gloomy imprisonment, with nothing to occupy their thoughts. It would probably be most disastrous to the administration of justice, and especially to prisoners, to attempt, in these days, the enforcement of such rigid severities, so repugnant to all the usual habits of life. And for one, I am not satisfied that the irregularity in the present case has been in the slightest manner prejudicial to the prisoners; but on the contrary, as far as the evidence leads me to any conclusion, I should deem it favorable to the prisoners. The indulgence ceased the moment when the charge was given, and the jury were then put upon their own solemn and exclusive deliberations on the case.

The other ground is, that the jury, while they had the cause in charge, drank ardent spirit. Now it is most material to state certain facts which took place at the trial, and which though wholly passed over in this motion, yet essentially affect its validity and force. After the charge was given by the Court to

the jury, one of the jurors in open court stated that he had been unwell for several days, and still was so, and that it was impossible for him under the circumstances to confine himself to water, without danger to his health; and he wished permission to use such spirit as might be required for his health. The counsel for the prisoners then assented in open court to this indulgence, and it was also assented to by the District Attorney, who at the same time suggested that the like indulgence ought to be extended to any others of the jurors, whose state of health, from the great length of the trial, and their unusual confinement, might also require it. The counsel for the prisoners then gave their consent to this extension of the indulgence. It was accordingly stated to the jury in open court that it was so granted; but they were at the same time advised to use the indulgence as little as possible, and in as moderate a manner as practicable.

Now upon this statement, where there was an express consent given by the prisoners' counsel in open court to this indulgence to the jurors, it seems to me impossible that the present objection can be sustained, unless it is shown, that the indulgence was grossly abused, and operated injuriously to the prisoners. Of this there is not the slightest proof, nor indeed was it even pretended at the argument. On the contrary, the only evidence in the case to establish the fact of drinking ardent spirits, comes from one of the jurors, who is said to have stated, after the trial was over, that he was sick and went down to the bar, and got a glass of brandy and water. The juror himself has not been examined.

And this renders it wholly unnecessary to consider the authority and bearing of the cases cited at the bar on this subject; and especially the cases of *The People* v. *Douglass*, 4 Cowen R. 26. *Brant* v. *Fowler*, 7 Cowen R. 562, and *The People* v. *Ransom*, 7 Wendell R. 417, for they all turn upon very different circumstances.

The other parts of the original motion, are in arrest of judg-

ment, if the motion for a new trial should be denied. Some of the causes assigned for this purpose, viz. those respecting the arraignment, and that there was no joinder of issue, and no putting themselves upon the country for trial by the prisoners, have been already considered. It only remains to take notice of the objections taken to the sufficiency of the indictment. The first objection is, that no venue is laid in the indictment; that is, that no particular place is stated on the high seas at which the robbery was committed, but it is only alleged that it was committed on the high seas. And reference has been made to some indictments in cases of piracy, where the offence is stated with more particularity of place, for example, "on the high seas in a certain place distant about ten leagues from Cursheen, &c." and "on the high seas about a half league distant from Leghorn, &c."[1] But there certainly are precedents which contain no such specification of place,[2] and in all the indictments for piracy in this district (which have been numerous, and upon which convictions and executions have taken place), our researches have not detected a single one in which such locality of place is to be found. The indictment has usually charged the piracy to be committed upon the high seas within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular State, as it is charged in the present indictment, and without any further specification of place. And I am not aware that any different course of practice has been adopted in any other district.

Now, it is certainly not sufficient proof that an indictment is bad substantially, to show that forms can be found which are more special and particular in their allegations of place; for such particularity may be adopted only *ex majori cautela* by the pleader. It will be necessary to sustain the objection to show

[1] See 3 Chitty Crim. Law, 1130, &c. Id. 1135. (English Edit.) See also Kidd's case, 14 Howell, State Trials, 130, 147, 187, 188, 189, 190.

[2] See 3 Chitty Crim. Law, 1135. (English Edit.)

some authorities, which establish the necessity of averring such special locality of the offence, or some principle of law, which leads to the same conclusion. No such authority or principle has been shown upon the present occasion. My opinion is that the objection is unfounded in point of law; and that the averment in the indictment, that the offence was committed on the high seas within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular State, is sufficient certainty for all the purposes of the indictment and trial, without any other particular designation or averment of the locality of the offence. If such particular designation or averment of locality had been put into the indictment, it could not have tied up the proofs to that particular spot; but proofs of the commission of the offence in any other place on the high seas, would have sustained the indictment. The doctrine of *venue* in indictments at the common law is inapplicable to cases of this sort. At the common law all offences were required to be tried in the county where the offences were committed; and as the jury were to come from the neighborhood of the place where the offence was committed (technically called the *visne* or *visinage*), it was farther necessary to state in the indictment the particular parish, *vill*, or other place within the county from which the jury might come. And, in criminal cases it seems true even at this day in England, that the right to challenge the panel for want of hundreders exists, though it has fallen into disuse.[1] But even at the common law, although this certainty of averment of place was required, yet it did not tie up the party in his proofs; for the offence, if proved to have been committed any where within the county, was sufficient to maintain the indictment.[2] But the reason of the common law for laying the *venue* so particularly in offences on land, does not in any man-

[1] See 1 Chitty Crim. Law, 177, 189, 190, 194, 196, 197, (English edition). 4 Black. Comm. 303, 305, 306.

[2] See 1 Chitty Crim. Law, 200.

ner apply to offences on the high seas; for no jury ever did or could come from the *vine* or *visinage* on the high seas to try the cause; and no summons could issue for such a purpose. And even now in England, when offences on the high seas are cognizable and punishable under the statute of 28 Henry VIII. ch. 15, by the special commission court, and by a jury of the county for which the commission is issued,[1] no *venue* of any parish, *vill* or other place within the county is included in the indictment. The allegation that the offence was committed on the high seas is sufficient of itself to found the jurisdiction, and all the incidents of the trial and judgment.

But if it were otherwise at the common law, we are to consider that, in the jurisprudence of the United States, the present is a statute offence, and that the jurisdiction is given also by statute; and if the offence is so laid in the indictment as to bring the case within the language of the statute in point of jurisdiction and certainty of description, that is all which can properly be required in our country. The Crimes Act of 1790, ch. 9, s. 8, provides that if any person shall commit upon the high seas, &c. murder, or robbery, &c., he shall on conviction suffer death. And it further provides that the trial of all crimes committed on the high seas or in any place out of the jurisdiction of any particular State, shall be in the district where the offender is apprehended, or into which he may first be brought. And there are direct and positive allegations in the present indictment to all these facts. So that the jurisdiction is upon the face of the indictment made out in the most positive manner. And the Judiciary Act of 1789, ch. 20, s. 29, has provided for the manner of summoning juries for all cases of trials in the courts of the United States. So that there is in reality nothing upon which to suspend a legal doubt as to the sufficiency of the indictment in this respect. No further *venue* is necessary than what the

[1] See 4 Black. Comm. 269. 2 Hawk. P. C. b. ii. ch. 25, s. 43 to s. 47.

indictment contains. It in no manner affects the summoning the jury.

The other objection to the sufficiency of the indictment is, that it concludes in the plural, "against the form of the *statutes* of the United States in such cases made and provided," whereas it ought to conclude "against the form of the *statute*," &c. in the singular. It is admitted that the offence, as charged in the indictment, is within the Act of the 15th of May, 1820, ch. 113; and that if it is also within the Crimes Act of the 30th of April, 1790, ch. 9, s. 8, the objection is unmaintainable. Upon this point I profess not to feel the slightest doubt. There never was, as far as my knowledge extends, any judicial doubt breathed on any occasion, that the Act of 1790, ch. 9, did apply to all murders and robberies committed on board of or upon American ships on the high seas. If the Act did not apply to such cases, it is difficult to conceive to what cases it could legally apply. The general terms not only cover such cases, but many others. The only doubts that ever did occur, and were thought worthy of being considered by the Supreme Court, were, in the first place, whether murders and robberies, committed on the high seas on ships belonging exclusively to subjects of a foreign State and then under the acknowledged jurisdiction of a foreign sovereign, came within the meaning of the Act. The Supreme Court, in *United States* v. *Palmer* (3 Wheaton R. 610), thought they were not. Neither question was whether such offences committed on board of a piratical vessel, then in possession of pirates, and acknowledging the jurisdiction of no foreign sovereign, were within the meaning of the Act. The Supreme Court, in *The United States* v. *Klintock* (5 Wheat. R. 144), decided that they were. On this occasion the Court said, that the opinion in *Palmer's case* might well be understood to indicate an opinion "that the whole Act of 1790, ch. 9, must be limited in its operation to offences committed *by or upon citizens of the United States*," which is the very case before the Court. And

indeed *Palmer's* case necessarily leads to this result. And the case of *The United States* v. *Furlong et al.* (5 Wheat. R. 184), is direct to the same purpose, and covers the very case now before us. And, indeed, the language of the Court upon this last occasion is express, that it is sufficient for the indictment in such a case to conclude against the form of the statute in such case made and provided (in the singular), although it might be equally within the Act of 1790, ch. 9, and the Act of 1819, ch. 76, s. 5; thereby laying down the broad principle that a conclusion against the form of the statute (in the singular) is sufficient in all cases where the offence is distinctly within more than one independent statute. But I am of opinion that the present case is equally within the Act of 1790, ch. 9, and the Act of 1820, ch. 113; and if so, then it is admitted that the conclusion is in the strictest sense right. And I am also of opinion, that if the offence was punishable by a single statute only, and the conclusion was against the form of the statutes (in the plural) that it would, in point of law, be a good conclusion. I am aware that there is some diversity of opinion in the books on this point; but having had occasion many years ago, in *Kenrick in error* v. *United States* (1 Gallis. R. 268), to consider the question with great care, that was the conclusion to which my judgment deliberately led me; and I have since seen no occasion to change it upon principle or authority. Either way, then, the objection is unmaintainable.

These were all the causes or grounds contained in the original motion. At a subsequent day, however, other causes were assigned, which will now be considered.

The first is, that interpreters were admitted to interpret a part of the testimony of Perez without being previously sworn to interpret truly and faithfully. The facts were, that Mr. Badlam was sworn as a general interpreter of Spanish at the trial, and in an early stage of his interpretation of some of the testimony, Mr. Child (one of the counsel for the prisoners, and who him-

self understood Spanish), objected to some of the interpretations as incorrect, and requested that two other gentlemen, whom he had selected, might be sworn as interpreters. This was objected to by the District Attorney, who thought that it was his right to use such an interpreter as he had confidence in, leaving to the counsel for the prisoners to swear other interpreters in their own employ in the cause. The Court then, upon the suggestion of the prisoners' counsel, allowed these two interpreters to sit near Mr. Badlam and the witness, and to suggest to Mr. Badlam any doubt or mistake in his interpretation, for him to consider and rectify. This was accordingly done; and whenever any such suggestion was made by these interpreters to Mr. Badlam (who did not profess to be well acquainted with Spanish nautical terms), he considered it, and I believe invariably adopted their interpretation, and then stated it to the Court as his own interpretation. In a short time, however, it being perceived that the interpretation of nautical terms became very important in the cause, upon the suggestion of the Court both of these interpreters were sworn, and one of them (Mr. Peyton) was afterwards, during almost the whole of the trial, used by the Government as the exclusive interpreter. Now it is not, and it was not at the trial pretended, that ultimately any interpretation of the language of the witnesses by Mr. Badlam went to the jury, which was incorrectly given, without due correction. There was no dispute upon this head; and it could have been corrected in a moment, if it had been suggested, for Mr. Peyton was present throughout the whole trial. Under these circumstances the objection seems to me wholly groundless. Mr. Badlam gave every interpretation to the Court under oath; and he had certainly a right to use the knowledge of others to assist his own judgment in any case of doubt, giving his own interpretation finally to the Court. If there has been no mistake in the interpretation, what ground can there now be for any just complaint?

The next objection is, that upon the application of the counsel for the prisoners, the latter were not allowed to be placed near to the counsel, for the purpose of instructing the counsel in their defence, as they deemed necessary. Now the facts were, that though the usual place for prisoners, in all capital cases, is in the Dock or Prisoner's Bar, the prisoners in this case were all, for their own accommodation, and that they might hear the testimony, witness the proceedings, and have free intercourse with their counsel, placed within that portion of the bar, which is assigned for the use of counsellors at law, and within a reasonable distance from their counsel, who could constantly have the freest access to them; and to whom the Court stated, that every delay of time for this purpose, would be cheerfully given; and it was accordingly given. But the counsel wished to have the prisoners placed in the very front benches of the bar, in places constantly assigned for gentlemen of the bar. The Court thought such an indulgence inconvenient and unnecessary; and if it was yielded to in that case, it must form a precedent in all other cases, and that such a departure from the whole course of practice, usually adopted upon such occasions, would, from its nature, become liable to great objection. But the Court added, that an interpreter should sit by the prisoners, and punctually state to them the proceedings, and questions and answers; and that they might communicate with their counsel freely, and as often as they wished. And this was accordingly done. Even this objection, such as it is, applied only to a short period of the trial; for when the Court removed to another place (the Temple), the prisoners were placed as near to their counsel, as they well could be. Nor should it be put out of sight, that during this long and protracted trial, every indulgence, as to time and examination, was granted to the prisoners' counsel; that they had the fullest opportunity to communicate in court, and out of court, with the prisoners, upon all the matters in evidence, and to obtain their instructions. And we have not the slightest reason

to doubt that such communications, as far as they were deemed useful by the counsel, were most freely and fully used by them. Nay, to this very hour, no suggestion has been made, that any material fact or disclosure was omitted, which could have aided in the defence. Under such circumstances, I can perceive no ground to sustain this objection.

The next cause is, that the Court refused to have the order, in which the prisoners were placed at the bar, changed before the introduction of each of the witnesses for the government, who were excluded from the court room, after the first of these witnesses had been examined, and had retired. The Court did so refuse; and I am yet to learn, that there is any principle of law or duty, which required them to act otherwise. The reason why the Court did not yield to the request was, that it might otherwise seem, as if the Court intended to cast some imputation upon these witnesses, as confederating out of court together to tell the same story, and charge the same persons, sitting in the same order with the crime. But the Court said that it was open for the counsel of the prisoners, to make inquiries from each of the witnesses when upon the stand, whether they had had any such communication with the others out of court; or whether they had had any knowledge of the order, in which the prisoners were arranged. To some of the witnesses (if I rightly remember), such questions were put, and they negatived any such communications. Nor is there now any proofs, that any such communications were had, which could have influenced the testimony of these witnesses. The motion itself was new. It was a matter for the exercise of the sound discretion of the Court; and there is no proof, that it operated injuriously to any of the prisoners. Without imputing fraud and wilful perjury to these witnesses, I cannot perceive how the objection can be sustained.

The next objection is, that the witnesses for the government, were allowed, with the chart of the Mexican's route on her voyage before them, to be asked the question, whether under

the circumstances stated, of the supposed time of starting of both vessels, the Mexican and Panda would or would not be likely to meet at the point marked on the chart. The objection proceeds upon the ground that, under such circumstances, the question became a leading question; and ought not to have been put. My opinion is, that the objection is unfounded in law. The chart of the Mexican was already in the case, and it was proved by the mate that it contained her route on the voyage, and that he had marked that route from day to day, during the voyage on the chart, up to the point where the robbery was committed, and back again to Salem. For the purpose of asking the question, then, it might properly be taken as a supposed fact, that the Mexican was at a particular spot on the day of the robbery, having sailed from Salem on the 29th of August, and the question then to be asked of nautical witnesses, was, whether a vessel sailing from Havana, bound to Cape Mount on the coast of Africa, on the 20th or the 26th of August, would or would not be likely to meet her at that point. It seems to me, that this was not only a proper question to be asked of the witnesses, but in no just sense a leading question. It was a matter of nautical skill, experience, and opinion, and the examination of the chart was fit to enable the witnesses as well as the jury, with more accuracy and clearness, to examine all the elements which ought to enter into their opinion. The question was but coming directly to that very point, which, however circuitously, must have been aimed at, in the course of the inquiries, before the testimony could have any strong bearing on the case. Wherever the vessels might have met, if they could not have met at this very spot, where the proof stated that the Mexican was at the time of the robbery, the fact could have had no material influence on the case. If the vessels could not have met there, then the cause was clearly for the prisoners. If they could have met there, it would still remain to be shown that they did meet there. The real point,

therefore, of the whole inquiry was to ascertain, whether these vessels might or might not under the circumstances, have met at the very point where the Mexican was. It was the true and appropriate question, which the witnesses were called upon to solve in the negative or affirmative, according to their own skill, judgment, and experience in nautical affairs. The form of the question could not lead them, and it could not mislead them. And the question, in this very form, was afterwards repeatedly asked on behalf of the prisoners' counsel of their own witnesses.

The next objection is that the Court declared to the jury and delivered it as their opinion, that the prisoners had no right to pray instructions to the jury on particular points, after the delivering of the principal charge. The Court did not give any such direction to the jury upon the subject. The Court stated to the leading counsel for the prisoners, who was praying instructions at that stage of the cause and proceeding to reason them out at large, that he must be aware that it was wholly irregular, at that stage of the cause, to proceed in this manner. The regular course of practice in this court in all cases of this sort, is to state the points of law on which the counsel rely, and wish the instructions of the Court in their argument to the jury, or at least at some time before the charge is given, that the Court may have time to examine and consider them. It would otherwise happen, that the Court might be surprised into the necessity of expressing opinions, before due time was allowed to deliberate on them. It is understood, that this objection, after the explanations which have passed at the argument, is not now insisted on.

The next objection is founded upon the supposed refusal of the Court, to give an instruction to the jury, that under certain circumstances, at Nazareth, stated in the instructions, the crew of the Panda had a right to resist, to flee, or destroy the Panda, or to resort to any other means of self-defence, which they might deem expedient. In the actual form and qualified

manner, in which this objection is now couched, that "if the jury believed upon the evidence that," &c., (stating certain facts), I have not the slightest recollection, that the instruction was ever asked of the Court. On the contrary, I then understood it to be asked, in the manner and form in which it is expressed in the original motion, and not otherwise. And the circumstance that it was so asked, is strongly corroborated by the fact, that it is so stated in the original motion. But if it were otherwise, still I am of opinion that the Court have given the instruction, as fully as the prisoners' counsel were entitled to require it: and in a manner quite as favorable to the prisoners. And indeed, the whole merits of this objection have been already considered in the preceding part of this opinion.

These are all the objections which are in the written motions, and which have been so elaborately argued at the bar, excepting those which respect the weight of evidence upon the trial, and the new evidence now offered. I shall now proceed with the consideration of these objections.

And, first, it is said that the verdict is manifestly against evidence and the weight of evidence. My opinion is the other way. If the jury believed the evidence (and its credibility was a matter exclusively for their consideration), it appears to me, that their verdict was not contrary to evidence or against the weight of evidence, but coincident with both. And I apply this remark equally to the case of Boyga, Montenegro, Castillo, and Garcia; although certainly, the evidence was not equally strong against each of them.

The other point respects the new evidence now before the Court. I lay no particular stress upon the affidavit of Dalrymple (which has been objected to) for two reasons: first, because he might have been produced as a witness on the stand at the trial, by the counsel for the prisoners, as Battis expressly pointed him out at the trial as having been spoken to by him. And secondly, because I do not think, correctly considered, that any

thing contained in Dalrymple's affidavit does impugn what Battis stated at the trial. The affidavit of Alexander Thomas is principally to collateral matters only.

The other affidavits are of the prisoners who have been acquitted. They positively swear to certain facts, which, if true, are utterly inconsistent with the testimony and statements of the witnesses for the Government. First, they utterly deny that they ever met or robbed the Mexican during the voyage. Secondly, they utterly deny any intention or attempt to blow up the Panda at Nazareth. Upon this last point they are opposed by the direct and strong testimony of Quentin, Domingo, and Silveira, all three of them disinterested witnesses. Upon the first point their testimony is irreconcilable with the strong and direct and disinterested testimony of the officers and crew of the Mexican (seven in number), and especially of those who speak positively to the identity of Ruiz, Boyga, and Delgado, if that testimony is not utterly unworthy of belief, and is not founded in the grossest and most extraordinary mistakes. It is also irreconcilable with the positive testimony of Domingo and Silveira, as to the confessions of several of the prisoners. And, if Perez is to have any credit, where he is confirmed by other testimony, it is utterly irreconcilable with the whole substance of his testimony. Besides these considerations, it cannot escape observation that these acquitted witnesses stand in a very delicate and peculiar predicament in relation to the case. They were embarked, if the evidence upon the trial is to be credited, and upon which their own acquittal mainly proceeded, on a voyage in the slave trade, a voyage prohibited by the Spanish laws and treaties, and of such a character, that under such circumstances, it cannot but detract somewhat from the confidence which we should otherwise repose in their perfect integrity and credit. To this it should be added, that they were incompetent witnesses at the trial. And I cannot but think it would be most injurious to the general administration of public

justice to allow a new trial upon the merits, upon the evidence of persons charged as joint offenders after their acquittal, when they were incompetent witnesses at the time of the trial. The observations of the Supreme Court of Massachusetts upon this point, in the recent case of *Sawyer* v. *Merrill* (10 Pick. R. 16), strike me as entitled to very great weight, and I entirely concur in them. Indeed, an acquittal is not always proof of actual innocence; and it is frequently little more than a declaration, that the guilt of the party is not established by the proofs beyond a reasonable doubt.

But in a capital case, like the present, it appears to me, that the Court ought not, upon general principles, to grant a new trial, unless the fullest credit is given to the new evidence, and the Court is of opinion, that it outweighs in strength and clearness and force, the evidence on the other side. In short, my opinion is, that in a capital case a new trial ought not to be granted, if the Court possess the power, unless, taking into consideration the new evidence, the verdict in the opinion of the Court, ought to be the other way; and that, therefore, injustice has been done to the prisoners. There is much good sense in the remarks of the Court upon this subject, in the *State* v. *Duestoe* (1 Bay's Rep. 377). And looking at the evidence produced at the trial by the Government in this case, I cannot escape from the conclusion, that if the Court were to grant a new trial upon the affidavits of the acquitted prisoners, it could scarcely be justifiable, except upon the belief, that five at least of the Government's witnesses were either perjured, or their testimony was grossly and culpably incorrect; Butman, Reed, Quentin, Domingo and Silveira; and that the others had rendered themselves incredible in their statements. To such a conclusion I should be slow to arrive under any circumstances, when the witnesses were disinterested and unimpeached in point of general character, and their credit had been fully sustained by the verdict of an impartial jury. But if I could arrive at such a conclusion in any other

case, I could not arrive at it in this case, where the whole stream of evidence comes from persons, who were indicted as confederates in the offence, and who were then incompetent to testify. I cannot feel such confidence in such testimony as to lead me to the conclusion, that all is rank perjury or reckless delusion on the side of the Government's witnesses. This ground, therefore, for a new trial, is in my opinion insufficient also to sustain the motion.

I have now gone over all the grounds offered for a new trial, whether they are matters of law or matters of fact, as briefly as I could, though many of them would have furnished topics for a much longer discussion, if the occasion had required it. My decided judgment, upon a deliberate survey of all these matters, is, that the Court ought not to grant a new trial, if we possessed the power to grant one. But being of opinion, that we do not possess the power under the circumstances, I am for overruling the motion altogether.

I trust that I have a due and a deep sense of the responsibility thrown upon the Court upon the present occasion. No person could have desired more anxiously than myself, that I might have been spared from this painful duty. With the private opinions of other men, not sitting in judgment under the solemnity of an oath, or called upon to express opinions upon a judicial survey of the whole evidence (which the learned counsel for the prisoners has thought fit to bring into the case), we have nothing to do. As little have we to do with the appeals made through the press during the pendency of this cause, or with the supposed popular excitements, which have been alluded to at the argument. I trust, that this Court is incapable of being influenced by any such considerations, or of being betrayed by them into an abandonment of its own proper duty. I trust, that while I shall never be insensible to human life or human sufferings, I shall always possess the firmness to follow out with an unshrinking fidelity the dictates of my own conscience, and the

high commands of the law. I may err in my judgment, for I have not the slightest pretension to infallibility; but if I do err, it shall not be an error forced upon me by private opinions, promulgated through the press or otherwise.

My present judgment I cheerfully submit to the sober consideration of my country. It is my conscientious judgment, for which I am ready to assume the full responsibility belonging to my station, it having been the result of the best exercise of the powers of my understanding.

The following Opinion was given by the District Judge.

DAVIS J. I concur with the presiding Judge in the disposal of the motions before us, in this very serious case, which has so long engaged the devoted and solicitous attention of the Court, counsel, and jury. With the grounds and reasons of that opinion my own views coincide, excepting in one point, and on that, from its important bearing, as a Constitutional question, I consider it a duty to express my opinion. I refer to that part of the argument, which rests the denial of a power, in the Courts of the United States, to grant a new trial, on the merits, in a capital case, though at the request of a person convicted, on the 5th article of amendments to the Constitution, declaring, that "no person shall be subject, for the same offence, to be twice put in jeopardy of life or limb."

The case of a person, convicted of a capital offence, put on trial again, would certainly be embraced by the terms of the article; and yet, in my view of the question, it would not present a case within its true intent and meaning. That article, in the amendments to the Constitution, corresponding to a rule of the common law, according to the prevailing spirit and character of those amendments generally, was doubtless intended for the security and benefit of the individual. As such it may be waived and relinquished. That the request of a prisoner, for a new trial, affording a chance of escape from death to which a previous

conviction would assign him, should be rejected, from adherence to the letter of the rule, that his life would be again in jeopardy, would present an incongruity not readily to be admitted.

It is true, that according to approved authorities, the plea of *autre foits convict* depends on the same principle as the plea of *autre foits acquit*, that no man ought to be twice brought in danger of his life, for one and the same cause.[1] The doctrine establishes a right in the prisoner to resort to that defence, if it be attempted or moved, against his will, to subject him to a second trial. The case of a verdict of conviction set aside, at the request of the prisoner, is not suggested in those authorities, and would stand, in my opinion, on very different ground. The previous conviction would not, I apprehend, under such circumstances, be considered as a sufficient bar to a second trial. The concise manner in which many general maxims of the law are expressed, like general rules on other topics, admits or requires, in their application, distinctions, exceptions, and qualifications, all just, reasonable, and, in some instances, indispensable, not expressed in their terms. We have an instructive exemplification of this in an early case, in the Supreme Court of the United States, in which the meaning of the prohibition, in the Constitution, of *ex post facto* laws, came in question. "I do not consider," said Mr. Justice *Chase*, "any law as *ex post facto*, that nullifies the rigor of the criminal law, but only those that create or aggravate the crime, or increase the punishment, or change the rules of evidence for the purpose of conviction." 3 Dall. 391. The benign spirit, ever pervading our law, which dictated that distinction, may, as appears to me, have a proper influence and application, in reference to the rule of law under consideration, and in other instances of analogous character. By the old common law, observes Sir *W. Blackstone*, the accessory could not be arraigned till the principal was attainted, "unless he choose it,

[1] Black. Comm. b. iv. ch. 26. 2 Hawk. P. C. 377.

for he might waive the benefit of the law." (Comm. b. iv. c. 25). And in *The People* v. *McKay* (18 Johns. R. 21), a case of murder, Chief Justice *Spencer* remarks, "We know of no case which contains the doctrine, that where a new trial is awarded, at the prayer and in favor of a person that has been found guilty, he shall not be subject to another trial."[1] On the whole, I am not convinced that the article of the Constitution under consideration, would, in just and reasonable construction, be a bar to a new trial granted at the request of a person capitally convicted. I am not aware that there is any direct decision on this point. It is an open question. If a second trial, in capital cases, be inadmissible, under the article, though at the request of the prisoner, then no legislative enactment can vary the law on the subject, without an amendment of the Constitution. The question may thus become highly important, though the article should be binding only in the Courts of the United States; still more so if, conformably to Chief Justice *Spencer's* opinion, it extend to decisions in the State courts. A decision on this point, however, is not essential, as this case stands to a determination on the motion for a new trial, in which, notwithstanding a difference in opinion in reference to the constitutional question, we come to the same result. The discretion of the Court on the subject of new trials is not unlimited. They are allowable "for reasons

[1] *McKay* was convicted on an indictment for murder. Judgment was arrested, on motion in his behalf, for defect in the issuing and return of the *venire*. Agreeably to repeated decisions, there may be a new trial, in all cases, where there has been a mis-trial or mere irregularity in the former trial, vitiating or vacating the proceedings. But the question made by the counsel in that case, whether the arrest of judgment did not entitle the prisoner to be discharged, does not appear to have been met by the Court on that ground. "It will be observed," says the Chief Justice, "that the judgment is arrested on the motion of the prisoner, an act done at the request, and for the benefit of the prisoner, we are clearly of opinion cannot exonerate him from another trial."

for which new trials have usually been granted in the courts of law," and with this statute direction, we are to bear in mind the 7th article of amendments to the Constitution—"No fact tried by a jury, shall be otherwise re-examined, in any court of the United States, than according to the rules of the common law." Having reference to such directories, should the motion for a new trial in this case be allowed, there would, in my opinion, be a departure from the usages of courts of law, and from the principles manifested by the great current of decisions in cases of this description.

I agree with the presiding Judge, in the views which he has expressed on the motion in arrest of judgment, as well as with those on the motion for a new trial, excepting in the instance which I have specified, and in the result, that the motions be overruled.

The decision of the Court was then interpreted to the prisoners.

Mr. *Child* then begged leave to file a bill of exceptions, with a view of carrying the case before the Supreme Court, and urged that the case involved several important points of law.

The Court replied, that they must proceed to pass the sentence; but the motion of Mr. *Child* could be taken into consideration, and would be acted upon hereafter.

Mr. *Child* then earnestly pressed upon the Court to respite the execution, to give time to send to Havana and England, to clear up this dark and mysterious affair.

The Court said it should be allowed, and if the time proved not long enough, the Executive clemency would no doubt extend it, by a reprieve.

Story J., after hearing the several protests of innocence from the prisoners, on motion of *Dunlap*, District Attorney, proceeded to pronounce the sentence of the Court, as follows:

Prisoners at the Bar:

The motions made by your counsel for a new trial and in arrest of judgment having been overruled by the Court, and all other matters disposed of, it is now my painful duty to pronounce the sentence of the law upon each of you, for the crime whereof you severally stand convicted. I shall do this in as brief terms as possible, being conscious of the difficulty of addressing you through the medium of an interpreter only. The sentence is, that you, and each of you, for the crime whereof you severally stand convicted, be deemed, taken, and adjudged to be pirates and felons, and that you, and each of you, be therefore severally hanged by the neck until you are severally dead. That the Marshal of this District, or his Deputy, do, on peril of what may fall thereon, cause execution to be done in the premises upon each of you on the 11th day of March next ensuing, between the hours of 9 o'clock in the forenoon and 12 o'clock at noon, of the same day, and that you now be taken from hence to the jail in Boston, in this District, from whence you came, there, or in some other safe and convenient jail within the same District, to be closely kept until the day of execution; and from thence, on the day of execution appointed as aforesaid, you are severally to be taken to the place of execution, there to be hanged as aforesaid until you are severally dead.

I earnestly recommend to each of you to employ the intermediate period in sober reflections upon your past life and conduct, and by prayer and penitence, and religious exercise, to seek the favor and forgiveness of Almighty God, for any sins and crimes which you may have committed,—and for this purpose I earnestly recommend to you and to each of you, to seek the aid and assistance of the ministers of our holy religion of the denomination of Christians to which you severally belong. And in bidding you, so far as I can presume to know, an eternal farewell, I offer up my earnest prayers that Almighty God may in his infinite goodness have mercy upon your souls.

The above sentence was then interpreted to the prisoners by a sworn interpreter.

David L. Child, of counsel for the prisoners, now (on the 23d day of December), in pursuance of a suggestion made by him a week before, and immediately after the Opinion of the Court overruling the motion for a new trial and in arrest of judgment, moved to file a Bill of Exceptions, and requested the Court to sign the same, if found true. The Court said, that the bill might be filed, if the counsel wished it, on the record; but it could not be allowed by the Court. And it was accordingly filed, but without having been read, the counsel not wishing to read it, after the opinion of the Court was stated.

Story J. This being the case of a capital conviction, when the counsel for the prisoners, a week ago, suggested an intention to offer a bill of exceptions, the Court then stated, that it would be expected that he should show some authority to justify the Court in allowing a bill of exceptions in a capital case. It is now admitted, that the counsel have no authority to cite, which affirms the power in this court. And it is believed by the Court, that none exists. We have, however, in the interval between the suggestion and the present time, deliberately examined the point, and are fully satisfied, that no such power exists in this Court; and therefore it has not been deemed necessary to examine the correctness of the exceptions stated in the bill, which has been proffered.

In the first place, no power is given by statute to this Court, to allow any bill of exceptions in any criminal case whatsoever; and it seems impossible to infer it by implication from any provisions in the laws of the United States. The Circuit Courts have final jurisdiction in all cases of crimes; and no writ of error or appeal lies to the Supreme Court in any such cases. Now, the sole object of a bill of exceptions is to present the

matter for the revision of some superior court; and if no revision can be had, then the authority to allow a bill of exceptions would be utterly nugatory. The only mode contemplated by the laws of the United States to revise the opinions of the judges of the Circuit Courts in criminal cases is, when the judges are divided in opinion at the trial; and then the point of division may be certified to the Supreme Court for a final decision under the Judicial Act of 1802, ch. 31, s. 6. There was no such division upon the present trial.

If resort be had to the common law to aid us in examining this point, it will be found, that no bill of exceptions lies, in capital cases, even since the Statute of Westminster 2 (13 Edw. I., st. 1) ch. 31, which first gave a bill of exceptions. And the better opinion certainly now is, that that statute is confined to civil proceedings, and does not extend to any criminal proceedings whatsoever. As the authorities are not all agreed on this point in cases of mere misdemeanors, it is not necessary here to decide it in regard to the latter. But in capital cases, in cases of treason and felony, it is universally agreed in England, that no bill of exceptions lies. This was solemnly settled in the case of *Rex* v. *Sir Henry Vane*, which was a case of high treason. It is reported in 1 Levinz R. 68, and in various other Reports.[1] The very point was made; and according to Levinz's Reports, it was held by the Court, "that a bill of exceptions does not lie in criminal cases; but only in actions between party and party." The application was accordingly overruled, and Sir H. Vane was executed on Tower Hill. The same doctrine is laid down in Hawkins (2 Hawk. P. C. ch, 46, s. 198), who says, "It hath been adjudged, that no bill of exceptions is grantable on an indictment of treason or felony, the Statute of Westminster, &c., having never been thought to extend to any such

[1] See the same case reported in Howell's State Trials, 130. 1 Keble R. 304, 315, 319, 324. 1 Sid. R. 84. T. Raym. 486. Kelynge R. 15.

case." Lord *Hardwicke*, in *Rex* v. *Inhabitants of Preston* (Cas. Temp. Hard. 251, S. C. 2 Str. 1040), said, "Nor was it ever pretended, that in capital cases a bill of exceptions lay. In *Sir H. Vane's case*, it is not said to lie in any criminal case. But that point is not settled, and therefore I will give no opinion as to that." In *Bacon's* Abridgment (1 Bac. Abridg. Bill of Exceptions), it is said, "It is agreed, that no bill of exceptions is to be allowed in treason or felony." And the same doctrine will be found in other elementary writers;[1] and no authority to the contrary can be found.

In *The People* v. *Holbrook* (13 John. R. 90, S. P., 6 Cow. R. 565), it was held by the Supreme Court of New York, that no bill of exceptions lies in any criminal case; and this doctrine is not only supported by *Sir H. Vane's case*, but by *Rex* v. *Barkshead*, (T. Ray. 468; 1 Sid. R. 85).

There is then no pretence to say, that in capital cases this Court can draw in aid the doctrines of the common law, as administered in England, to confer such a power. It is not implied from any Statute authority. It is not implied in any reasoning at the common law, or under the Statute of Westminster. We are therefore of opinion, that this Court possesses no such authority; and we dare not assume, what has never been confided to the Court.

If this objection were not, as we think it is, conclusive, we think, that the bill of exceptions ought not now to be allowed, upon another and a distinct ground. It was not made or tendered at the trial, nor until a long time afterwards, and after a motion made and argued for a new trial and in arrest of judgment, and the opinion of the Court deliberately had thereon. Under such circumstances, where the verdict was satisfactory, and the Court feel no doubt about the law, it is our opinion,

[1] See Buller N. P. 316. 1 Chitty Crim. Law, 622, (English edition). Willes R. 535, and note (b), which cites 2 Inst. 424, and Saville R. 2.

that the bill of exceptions ought not to be allowed. It is not within the general principles, which regulate rights of this sort.[1] The Government has its rights, as well as the prisoners.

Bill of Exceptions not allowed.

[1] See 1 Salk. 288. 8 Mod. R. 222. 2 Tidd Prac. 788.

CIRCUIT COURT OF THE UNITED STATES.

Fall Circuit.

RHODE ISLAND, NOVEMBER TERM, 1834, AT PROVIDENCE.

BEFORE { Hon. JOSEPH STORY, Associate Justice of the Supreme Court.
Hon. JOHN PITMAN, District Judge.

EDWARD DEXTER, JR. AND OTHERS

v.

ANNA ARNOLD, ADMINISTRATRIX, AND OTHERS.

In exceptions to a Master's Report, a general assignment of errors is insufficient, unless specific errors are shown.

The Master was right in refusing to inquire into the original consideration of a mortgage, when this mortgage, in an account settled between the parties, was treated as a good subsisting mortgage for the full amount stated therein, and when the bill did not charge that the consideration was nominal, or that there was any mistake therein, or ask for any examination thereof.

A mortgagee is bound to make all reasonable and necessary repairs upon the mortgaged premises while in his possession, and will be responsible for the damage occasioned by any wilful default or gross neglect in this respect. The natural effects of waste and decay, from time, he will not be bound to repair.

Quære—If a mortgagee, who lays out money in permanent repairs for the benefit of the estate, may claim an allowance therefor.

Exceptions to a Master's Report must be founded on the facts stated in the Report, or in the accompanying documents and proofs.

The Master was right in refusing to open an account settled in 1801, as no leave was given to surcharge and falsify that account, and there were circumstances, which shewed, that the account had already been adjudicated in a former suit by this Court.

The Master was right in charging the estate of the mortgagee with the money received, as the consideration, on giving an absolute deed of the mortgaged premises.

An absolute deed of mortgaged premises given by the mortgagee operates as a conveyance of a defeasible title only, and not as a disseisin, as between the mortgagor and mortgagee.

A mortgagee, who keeps no accounts of the rents and profits received by him, is properly chargeable with what he may be presumed to have received, and, if in the occupation of the premises, also with an occupation rent. And the Master was right in embracing all these items in an account of rents and profits *received*.

Where a mortgagee has kept no accounts of the rents and profits received by him, the Master will exercise a sound discretion upon the whole evidence with regard to the amount for which he should be charged, without resorting to the standard of an occupation rent.

Bill in Equity to redeem a mortgaged estate. The cause, as formerly heard in this Court, will be found reported in 1 Sumner R. 109—120. It now came again before the Court, upon the Report of the Master, W. R. Staples, Esq. The Report was as follows:

On the 25th day, and on divers days afterwards, having been attended by counsel for the complainants, and for the defendants, said Anna and James Arnold, and having examined the evidence taken in chief in said cause, and taken the testimony of divers witnesses, produced before me, and the examinations of said Anna and James, under affirmation, upon interrogatories touching the matter directed to be inquired into; and having also examined the books, papers and documents produced by said Anna, as and for the books, papers and documents of said Thomas, relating to the subject-matter in dispute,—after due consideration of the same, I have stated the account of the amount due, upon the foot of the mortgage mentioned in the said decree, and of the rents and profits of said mortgaged pre-

mises, received by said Thomas Arnold, in his lifetime, and by said Anna, administratrix on the estate of said Thomas since his decease, allowing said mortgagee for repairs and expenditures in the premises.

The complainants contended, that all moneys received by said Thomas Arnold, on Jonathan Arnold's account, and not accounted for, ought to be presumed to have been received on account of this mortgage or the mortgage on the Paget Farm, so called, under the existing circumstances of the case. In pursuance of this position, they claimed the following sums, to be deducted from the original consideration of this mortgage, to wit:—The sum of $430, said to have been received by said Thomas, of Vincent Gray, of the Havana, together with interest thereon; the amount of a note for £100, part of the consideration of the mortgage given by said Jonathan to said Thomas, of the Paget Farm; the said note, as they contended, being charged by said Thomas to said Jonathan in the account settled between them on the 31st March, 1801, and not endorsed on said mortgage of the Paget Farm,—together with the interest thereon; the amount charged by said Thomas to said Jonathan in said account, settled March 31, 1801, for premium on schooner Fame, viz: One hundred and eighty dollars, with twelve dollars interest thereon, on the ground that the same was embraced in a previous charge in said account,—with interest thereon; the amount of five hundred seventy-three dollars, eighty-seven cents, being the difference between the amount of said Jonathan's note to Joseph Rogers, and the amount said to have been received on said note by said Rogers, of said Thomas, with interest thereon. These sums I rejected, and refused to receive evidence in relation thereto, on the ground, that they entered into and made parts of the account settled between said Thomas and Jonathan on 31st March, 1801, which account has been already adjudicated upon and settled by this honorable Court; and that if any claim for the same exists against said Thomas or his representatives, it is

against him as agent or administrator of said Jonathan, in both which capacities the said Thomas, in his lifetime, accounted to this honorable Court. Considering also, that the mortgage in this cause is credited to said Jonathan by said Thomas in said account of March 31, 1801, I have deemed it unnecessary to inquire into the original consideration of said mortgage, or to require proof of the existence or payment of the notes and acceptances charged in said account, or to enter into or state interest account in relation to said account, presuming that when said account was so settled and adjudicated upon, this item of credit was considered, that the rest of the account was adjusted in reference thereto, as the same there stands credited.

The complainants also contended, that they ought to be credited with rents of the mortgaged premises for the years 1793, 1794–5–6–7 and 8. This claim I have also disallowed, on the ground, that the mortgage was dated in 1800, and admitting that said Thomas received said rents, he was liable for them as agent, and not as mortgagee, and in that capacity has accounted for them, or been called upon to account them to this honorable Court. I have however charged the respondents with rents from 5th November, 1799, in consequence of the admission of James Arnold, in his answer, that at the settlement of said account of March 31, 1801, it was the understanding and intention of said Thomas and Jonathan, that the rents from that time should inure to the benefit of said Jonathan, under said mortgage, and in consequence of the same being credited to the account, rendered by said Anna Arnold, of the rents and profits received toward said mortgage.

The complainants also claimed for "damage of the store by the entire neglect of the mortgagee in possession, to shingle the store, eight hundred dollars." The store here referred to is the store on South Main Street. That the premature decay and dilapidation of said store, was occasioned by neglect to repair it, I take to be fully proved, if not admitted, by the said Anna and

James. Yet I have not deemed it equitable to charge them with the damages occasioned by such neglect, inasmuch as the mortgagee during the whole period of his possession of said estate, under his mortgage, was a tenant thereof in common with Asa Arnold and the heirs at law of Welcome Arnold, and it was neither proved nor suggested that he was ever requested by the other owners to join in any repairs on said estate, or that Jonathan Arnold or any of his heirs, ever intimated the propriety or expediency of making any. While on the other hand it was proved that Samuel G. Arnold, the attorney of the administrators, on the estate of Welcome Arnold, and one of the heirs at law of said Welcome, occupied the upper part of said store from 1801 to 1811 or 1812, when it had become out of repair, and leaky, and must, therefore, have been intimately acquainted with its situation, and was requested by the agent of said Thomas, afterwards, to join in repairs, and refused so to do.

The complainants also claimed "the value of one third part of the Fox Point lots, part of the mortgaged premises, sold by Thomas Arnold on 21st Dec. 1810, by absolute deed." This claim was resisted by the mortgagee. Nevertheless, it has appeared to me that said sale could not have been effected by said Thomas, had not this mortgage been held by him. That his covenants of warranty are mere personal obligations, insisted upon by the purchasers to protect what they knew, was, without them, an invalid title, and voluntarily entered into by said Thomas, either to insure the sale of the other undivided part of said lots, or to accelerate the collection of his mortgage debt, that the money so received was received for the mortgagor's property. And that the effect of said sale will be to deprive the mortgagor of part of his estate without an equivalent; and to vest the proceeds thereof in the mortgagee, without any consideration, unless the mortgagee is made to account for them toward this mortgage. For these reasons, I have allowed said claim for one third part of the amount received by said Thomas, for said lots, with

interest thereon, from the day of said sale, December 21, 1810.

Much of the difficulty in ascertaining the rents and profits, with which the mortgagee ought to stand charged, has arisen from the fact that the mortgaged premises were an undivided third part of an estate. This difficulty has been increased by the following circumstances, viz. that Thomas Arnold himself was some years a tenant of a part of the estate; that Samuel G. Arnold, at one time, also occupied a part of the estate on Welcome Arnold's right, that sometimes Thomas Arnold received rents on Asa Arnold's right, sometimes charged rents to Samuel G. Arnold & Co.; at other times Samuel G. Arnold and Company received rents for Jonathan Arnold; sometimes Jonathan Arnold received rents himself of the tenants, and more than all, from the fact that Thomas Arnold kept no regular account of the rents he received. The account, presented by the administratrix on the estate of said Thomas, is made up, from the rent-rolls of said Thomas, his accounts with the tenants, his cash books, and credits given him by tenants in their accounts settled. I did not, therefore, consider myself bound by the account so presented, especially when on inspecting it and comparing it with the vouchers from which it was made, I discovered some inaccuracies and omissions. Nor could I satisfy myself with what rents said mortgagee should stand charged, without first estimating the fair rent of the whole premises, under their peculiar circumstances, and then charging him with one third part thereof. This course appeared to me the more proper, from the fact that certain rents were received by Samuel G. Arnold and Company, on account of Jonathan Arnold, which were relinquished by Thomas Arnold in the compromise settlement made between said Thomas and Samuel G. on the 13th day of June, 1823, the amount of which could not be ascertained by the evidence in the cause.

The estate consisted of a lot of land, forty feet in breadth,

extending westward from South Main Street to the channel of the river. On the east end is a store two stories high, about sixty-five feet in length, and twenty in width, with a cellar under the whole length of it. Towards the west end was an old store, two stories high, about twenty by thirty feet. To the west of this was a cooper's shop. When these buildings were erected, has not been made certain by any proof, nor the state of repair in which they were at the date of the mortgage. A hatter's shop was erected on the front of said lot, after the date of the mortgage; but when or by whom no evidence has been produced to me. The cooper's shop is called, in the testimony, a very old building. This was either carried away by the "gale" in 1815, or demolished in the following year, when South Water Street was opened. The old store was much injured in "the gale," the lower story being almost wholly demolished by it. But it was standing when partition was made in 1828. The store on South Main Street was abandoned as untenantable in 1823, though the cellar under it, to the present time, has been occasionally occupied for storing such goods as would take no injury from wet. In 1828, a partition of said estate was made on the suit of the children and heirs at law of Samuel G. Arnold, by which the eastern part of said lot, extending back sixty-five feet from South Main Street, and the north half of the wharf, being about twenty by twenty-five feet, was set off for the third part of the estate that belonged to Jonathan Arnold.

In ascertaining the fair rent of these premises, I have divided the time into five periods. The first of which extends from November 5, 1799, to November 5, 1805. During this period Paul and Hull, or Peleg Hull, rented the front shop in the store on South Main Street at $80, and the room back of it at $30 per year. Samuel G. Arnold & Co. occupied the other parts of said building, but at what rent, is not shown. I have supposed it to be worth at least $75 per year, as afterwards the cellar alone was charged him by Thomas Arnold, at the rate of

$36 per year. The old store was occupied by Thomas Arnold with one third the wharf; for this I have supposed $90 per year was a reasonable rent, as that amount was afterwards charged by said Thomas to subsequent tenants, and as the cooper's shop was occupied from 1802 at the rate of $25 per year. I had no hesitation in charging the mortgagee with the same rent during this period. I have, therefore, considered the fair rents of the mortgaged premises, during this term, to be three hundred dollars, and that the mortgagee of the undivided third part thereof, ought to be charged with one third part thereof.

The second period extends from November 5, 1805, to December 21, 1810; five years, one month, and sixteen days. During this period, Paul and Hull, or Peleg Hull, rented the same part of said premises, and at the same rent, viz. $110 per year. The old store continued to be occupied by Thomas Arnold, or rented to other tenants at the same rent, viz. $90 per year. The cooper's shop was rented for $25 per year, until April 1, 1807, and from that time to January 28, 1808, at $15 per year; the reduction being made in consequence of the increased state of decay of said building. After 1808 there is no evidence of any rent received for it by any person. I have estimated the fair average yearly rent during this period, to be $10 per year. The second floor and cellar of the store on South Main Street was occupied or rented by Samuel G. Arnold and Company, during the whole of this period, and I could find no cause to change the amount of rent. I have, therefore, considered the fair rent of the mortgaged premises during this period, to be two hundred eighty-five dollars, one third part of which ought to be charged the mortgagee.

The third period extends from December 21, 1810, to December 21, 1823, being thirteen years. The lower part of the old store was rented until December 31, 1811, at $60 per year, and the upper loft until November 21, 1821, at $30 per year; the wharf was rented from March 11, 1822, to the end of this

period, at $80 per year. I have considered $70 per year as a fair average rent of this part of said premises, during this period. Peleg Hull continued in the occupation of the front store on South Main Street until 1823, at $80 per year; and in the occupancy of the room back of it until 1818, at $30, and from then until 1823, at $15 per year. I have considered one hundred dollars to be a fair average yearly rent of this part of said premises, during this period. The rent of the upper room and cellar of this store, I have estimated at $36 per year. The hatter's shop was probably built about 1811, by some tenant who was chargeable with the ground rent only, until he abandoned it to the owners of the land. In 1819, I find it rented for $60 per year. I have assumed $30 to be a fair average yearly rent during this period. The yearly rents from 1810 to 1823, of the whole premises, I have estimated at $236, one third of which should be charged said mortgagee.

The fourth period extends from December 21, 1823, to the time partition was made of these premises, in 1828, being four years and six months. The wharf and old store was rented from the commencement of this period, to March 11, 1826, at $80 per year, and from that time until partition was made, at $150 per year. I have considered $110 to be a fair average yearly rent for the same during this period. The store on South Main Street remained, during this period, generally unoccupied; as the cellar under it was occasionally occupied, a fair rent of that part of the premises, I have estimated to be $40. The rent of the hatter's shop I have also estimated at $30. I have, therefore, considered the fair average yearly rent of the whole premises, from 1823 to 1828, to be $180, one third part of which ought to be charged said mortgagee.

The fifth and last period extends from the time partition was made, to June 15, 1833, being five years eleven months and twenty-five days. I have considered the store on South Main Street with the cellar under it, to be of the yearly value of forty

dollars. The hatter's shop to be of the yearly value of thirty dollars, and the north part of the wharf to be of the yearly value of twenty dollars; that being the sum for which the same was rented in 1832. These comprehending the part of said premises, that was set off for Jonathan Arnold's share in said estate, the said amounts being ninety dollars per year, I have considered ought to be charged to said mortgagee.

As I found, on stating the account on these principles, that the rents to be accounted for by said mortgagee, up to the 21st day of December, 1810, together with the amount on that day received by him, on the sale of the Fox Point lots, exceeded the amount of interest due on said mortgage debt, and the repairs on said estate and interest thereon, up to said date, by the sum of $426,81, I deducted said sum of $426,81 from the principal, and allowing interest thereon, with interest also on the repairs, made on said estate up to the fifteenth day of June, 1833; I report that there is the sum of one thousand, three hundred and sixty-six dollars, thirty-six cents, due on said mortgage.

My principal reason for reducing the rents in the second, third, fourth and fifth periods, was the increased dilapidation of the buildings from want of repairs; but the opening of South Water Street in 1816, though it added much to the value of the whole estate, decreased its productiveness, as the most valuable part of the buildings stood on South Main Street.

To this Report exceptions were filed by the plaintiffs and defendants. Those of the plaintiffs were as follows:

1*st*. For that the said Master, has stated and certified in said report, that there is due on the said mortgage, mentioned in plaintiff's bill, the sum of $1366,36, whereas he ought, as the plaintiffs are advised, to have reported that there is nothing due upon said mortgage.

2*d*. For that the said Master, in said Report, has stated that

he deemed it unnecessary to inquire, and he did not inquire into the original consideration of said mortgage, whereas the bill of the plaintiffs, charges that the nominal consideration mentioned in said mortgage, was never received by the mortgagor, who ignorantly signed said mortgage, and the said supposed consideration was stated in said mortgage, to consist of certain supposed and undescribed notes and acceptances, alleged by the mortgagee to have been taken up by him, which the plaintiffs did and do deny that he did take up, so as to be a creditor of the mortgagor therefor, at the date of said mortgage to the amount of said nominal consideration. And the said Master ought, as the plaintiffs conceive, to have inquired into said consideration.

3*d*. For that the said Master, in said Report, and in the account annexed thereto, has allowed to the defendants, the full amount of said supposed consideration, and interest thereon, under the supposition, as by him in substance stated, that he was concluded thereby, whereas the said Master, as the plaintiffs conceive, ought not to have allowed the same.

4*th*. For that the said Master, in said report and account, has made a deduction, from the annual value and rent of the said mortgaged premises, as they were received by the mortgagee, on the ground that the same or parts thereof, became untenantable for want of repairs, while in the hands of said mortgagee and his representatives. Whereas the same were received in good tenantable order and repair, by said mortgagee, as appears by said report, and the exhibits accompanying the same, and were partly rented and partly used by the said mortgagee and his representatives, and the said Master ought, as the plaintiffs conceive, to have reported and charged in said account, against said defendants, the annual value and rent thereof, for the whole time of possession by said mortgagee and his representatives, according to the value and rent thereof, at the time he took possession thereof, deducting a reasonable sum for repairs.

5*th*. For, that the said Master, in said report and account, has

reported and charged nothing against said mortgagee and defendants, for the destruction and dilapidation of the buildings on said mortgaged premises, although he has therein stated, that such destruction and dilapidation took place, while the premises were in the possession of said mortgagee and his representatives. Whereas he ought, as the plaintiffs conceive, to have charged in said account to said defendants, or credited said premises, and allowed and reported in favor of the plaintiffs, a sum equal to the damages by such destruction and dilapidation, with interest.

6*th*. For, that the said Master has disallowed, and as stated in said report, refused to receive evidence, in relation to the charge of a note for £100, and interest thereon, exhibited and claimed by the plaintiffs, which note, as the plaintiffs allege, has been twice paid to said mortgagee, and has not been accounted for by him, whereas the said master, as the plaintiffs conceive, should have charged the defendants with said sum and interest.

7*th*. For, that the said Master in said report and account, has not charged the defendants with the sum of $192, and interest, and refused to receive evidence in relation thereto, which sum was paid to said mortgagee, under a mistake and error, as for premium and interest, for insurance on the schooner Fame, when no such sum was due for such insurance. Whereas the said Master, as the plaintiffs conceive, ought to have received evidence of said charge, and to have charged said sum and interest thereon, to the defendants in said account.

8*th*. For, that the said Master, in said Report and account, has not charged the defendants with the sum of $573,87½, paid to said mortgagee through error, as for money advanced by him, to take up said mortgagor's note to Joseph Rogers, being an excess paid to said mortgagee by said mortgagor, over and above the sum so advanced by said mortgagee—and refused to allow the same, and to receive evidence thereof, on the grounds that the same had been already settled, and adjudicated and accounted for, by and between said mortgagor and mortgagee. Whereas

such is not the case, and said Master ought to have received evidence in relation to said charge, and to have charged the defendants therewith, and with interest thereon, in such account.

9*th*. For, that the said Master has certified in said Report, that he refused to allow or to receive evidence, in relation to all moneys received by said Thomas Arnold (the said mortgagee), on Jonathan Arnold's account, and not accounted for, and that said Master did refuse to allow such moneys received by said mortgagee, although from all the accounts and exhibits, offered and shown by the plaintiffs and defendants, it appeared that moneys had during said mortgagee's possession, been received by said Thomas, of said Jonathan, and his estate which were not appropriated, when received to any other account, than that of this said mortgage, which at the time of such reception of moneys, was the only undischarged evidence of claim or demand, on the part of said mortgagee against said mortgagor, the said Paget's mortgage having been adjudged by this honorable Court to have been overpaid, and which moneys so received, were never accounted for, or credited by said mortgagee in any other account. Whereas the said Master, as the plaintiffs conceive, ought to have received evidence of, and allowed the plaintiffs' charges, for said moneys and interest thereon.

10*th*. For, that the said Master has, in said report and account, disallowed the sum of $430, and interest charged by the plaintiffs, on the ground that the same was settled in a certain account of March 31, 1801, between the mortgagor and mortgagee, whereas it appeared that said sum, (being a balance of $500, received of one Vincent Gray after deducting a credit,) was received by said mortgagee, of the proper moneys of the mortgagor, *after* the said 31st March, 1801, and did not enter into said account, and the same ought to have been charged by said Master, to said defendants, with interest.

11*th*. For, that the said Master, in said report and account, has charged interest on the consideration of said mortgage, from

a time anterior to that, when there was any balance due from said mortgagor to said mortgagee, for and on account of any notes or acceptances, or payments therefor, secured or intended to be secured by said mortgage, and anterior to the dates and payments by the mortgagee, of any such notes or acceptances; and rejected the plaintiffs' evidence, in relation thereto, and declined entering into any interest account, in respect of the same, or to ascertain the respective times, for which interest should be charged on said notes and acceptances. Whereas the plaintiffs conceive, that said Master should not have charged interest on said sum from said time, and should have received the evidence aforesaid, and stated an interest account in relation to said payments, and should have treated said mortgage as collateral security, for sums which were to be originally and truly evidenced by other vouchers.

12*th*. For, that the said Master, previous to making said Report, did not require of the defendant, Anna Arnold or James Arnold, the production of the cash books of said mortgagee, of the years previous to 1806, which were called for by plaintiffs, although it was admitted by said Anna in her answers to plaintiffs' interrogations exhibited with said report, that such cash books did exist, and were not out of her reach or power.

13*th*. For, that the said Master, at the hearing, ordered upon argument, that certain books of the said mortgagee, should be produced by said Anna Arnold, administratrix, under a call therefor by the plaintiffs—which said books, were accordingly brought before him at the hearing, but the said Anna and James Arnold, refused to permit the plaintiffs or their counsel, to open or look into the same, and the said Master did not, though requested by the plaintiffs, require said books so produced, to be opened for the inspection of the plaintiffs, as the plaintiffs conceive he should have done.

14*th*. For, that it is not stated in said Report, when nor for what reason, the said Samuel G. Arnold refused to join in

repairs, although it is stated, that the said premises had a long time previous, been suffered to be out of repair, without any attempt of said mortgagee to repair the same, and although in fact the said Samuel G. made no objection, except that he wished the *title* or proportions of ownership, to be first settled; and, although it does not appear by said Report, that the mortgagee at any time did what he could, towards keeping said premises in repair. And, although the said mortgagee was at said times, and during his possession, also agent of the estate of the late Welcome Arnold, and had power as such to repair.

15*th*. For, that the said Master declined receiving evidence in relation to the errors, in the said Account of March 31, 1801, and has not allowed to the plaintiffs, the sums shewn to be errors in said account, although the said account was produced at the hearing of the defendants Anna and James Arnold, for the purpose of proving the reception and full amount of the consideration of said mortgage and the payments of notes and acceptances, mentioned in said mortgage by said mortgagee.

16*th*. For, that the amount credited by said Master, for the annual value of the rents and occupation of said premises, is by far below the real annual value thereof, and as the plaintiffs conceive, much larger annual sums ought to be credited to said estate therefor in said account.

The exceptions filed by the defendants, were as follows:

1*st*. For, that it appears in and by said report and account, thereunto annexed, that the said Master has allowed said complainants, for the one third part of the amount received by said Thomas, for the sale of the Fox Point Lots, whereas the said complainants, ought not to have been allowed any part of said amount.

2*d*. For, that it appears in and by the decree of said Court, that the Master was ordered to take an account of the rents and profits, *received* by the said Thomas: Whereas the said Master

has charged the estate of said Thomas, with a large amount of rents, which have never been received by said Thomas, or his said administratrix.

3d. For, that the said Master has allowed a much larger amount of rents, than are contained in the account of the administratrix, and has reported, that on comparing said account with the vouchers, he found several inaccuracies and omissions, whereas he should have allowed no more rents than are credited in said account, and should have reported that said account was correct, was confirmed by the vouchers and by the affirmation of the administratrix, and that there was no evidence in the cause shewing any inaccuracies or omissions in said account.

4th. For, that the said Master, has allowed one third of what the whole premises would have let for, according to his estimate, whereas, if he went according to an estimated rent, instead of the actual amount received as credited, in the account of the administratrix, his estimate should have been of what an undivided third part would have let for at auction.

5th. For, that the said Master has reported that said Thomas Arnold, kept no regular account of the rents he received, whereas he should have reported that the rent-rolls, cash book, and other books of account of said Thomas, produced before the Master, exhibited a full, true and exact account of all the rents received by said Thomas, from said mortgaged premises.

6th. For, that the said Master, in estimating the rent to be allowed for the first period, has taken into consideration a charge of $36 per year, which he reports as made by said Thomas against Samuel G. Arnold, for the rent of cellar of the store on South Main Street; whereas the cellar referred to in said charge, is the cellar of an old store, belonging to said Thomas, above the bridge.

7th. For, that the said Master, in estimating said rents, has estimated the rent of the whole premises, and for long periods of time, by what particular parts let for, for short periods of

time; whereas the estimate should have been, according to what an undivided third of the premises would have rented for, during the period for which the rents are charged.

8*th*. For, that the said Master in estimating said rents, has taken the rents of late periods, as the rule to fix the estimate for much earlier periods; whereas, the rents should have been allowed according to what they would have been, during the period for which they are allowed.

9*th*. For, that the said Master has allowed, for a continuous occupancy of said premises, for thirty-three years; whereas he should have deducted the time during that period, when said premises may reasonably be supposed to have been unoccupied.

10*th*. For, that the Master has reported no allowance to the mortgagee, for the hatter's shop on said premises; whereas, he ought to have reported an allowance for the fair value of said shop: or to have deducted such a sum, from the rents charged to the mortgagee, as such mortgagee reasonably allowed the tenant, for building the same.

11*th*. For, that the said Master has allowed $40 per year, for rent of store and cellar on South Main Street, from 1823 to the time of making his report, whereas he should have reported that after the year 1823, the said store and cellar were in such a state of decay, that they were untenantable, and that no rent was received for them by the mortgagee, and now ought to be charged the mortgagee, since that period.

The exceptions were argued by *J. L. Tillinghast* for the plaintiffs, and by *Richard W. Greene* for the defendants.

Story J. delivered the opinion of the Court, as follows:— The exceptions have been argued by the learned counsel at large; but our opinion will be briefly stated upon all of them, as we do not think, that they involve any serious difficulty. We shall first consider the exceptions of the plaintiffs.

1. The first exception is utterly unmaintainable. It is too loose and general in its terms, and points to no particulars. It comes to nothing, unless specific errors are shown in the Report; and those errors, if they exist, should have been brought directly to the view of the Court in the form of the exception itself. At present it amounts only to a general assignment of errors, and the argument on this exception has shown none.

2 and 3. The second and third exceptions apply to the refusal of the Master to inquire into the original consideration of the mortgage. Under the circumstances, the Master was perfectly right. In the first place, in the account settled between the original parties, on 31st of March, 1801, the mortgage was treated as a good subsisting mortgage for the full amount of the debt stated therein. In the next place, the bill does not charge, that the consideration of the mortgage was nominal, or less than the amount stated therein; or that there is any error or mistake therein; neither does it ask for any examination or overhauling of the original consideration upon any alleged error or mistake. It was clearly, therefore, a matter not properly in issue before the Master.[1]

4. The fourth exception is on account of the Master's having made a deduction of the supposed rent, upon the ground, that the premises were out of repair, and partly untenantable, while in possession of the mortgagee and his representatives. The argument seems to proceed upon the ground, that the mortgagee was bound to keep the premises in good repair; and therefore ought to be accountable for such rents, as might have been obtained, if he had done his duty in regard to repairs. We know of no universal duty of a mortgagee to make all sorts of repairs upon the mortgaged premises, while in his possession. He is bound to make reasonable and necessary repairs. But what are reasonable and necessary repairs must depend upon the

[1] See *Chambers* v. *Goodwin*, 9 Ves. 265, 266.

particular circumstances of the case. If a house is very old and dilapidated, he is not bound to go to extraordinary expenses to put it into full repair, if those expenses will be greatly disproportionate to the value of the estate, or to his own interest therein. Certainly it cannot be pretended, that he is bound to make new advances on the estate. In *Godfrey* v. *Watson* (3 Atk. 518), Lord *Hardwicke* said, that a mortgagee in possession is not obliged to lay out money further than to keep the estate in necessary repair. In *Russell* v. *Smith* (1 Anst. R. 96), it was decided, that a mortgagee, after long possession, was not bound to leave the premises in as good a condition as he found them. The fact also, that there has been a diminution of value of the rents, was there declared not to be sufficient proof of a want of proper repairs.[1] It is quite a different question, whether, if the mortgagee lays out money in proper permanent repairs for the benefit of the estate, he may not be allowed to claim an allowance therefor. That is a point dependent upon other considerations.[2] But where a mortgagee is guilty of wilful default or gross neglect as to repairs, he is properly responsible for the loss and damage occasioned thereby. That was the doctrine asserted in *Hughes* v. *Williams* (12 Ves. 495).[3] And

[1] See *Chambers* v. *Goodwin*, 6 Ves. 265, 266.

[2] See 1 Powell on Mortgages, by Coventry & Rand, 189 (a). 3 Powell on Mortgages, 956, note (a). *Saunders* v. *Frost*, 5 Pick. R. 259. *Moore* v. *Cables*, 1 John. Ch. R. 385. *Trimleston* v. *Hamill*, 1 B. & Beatt. 385. *Marshall* v. *Cave*, cited 3 Powell on Mortgages, 957, (a).

[3] S. P. *Wragg* v. *Denham* (2 Younge & Coll. 117, 121). In the latter case, Mr. Baron *Alderson*, in delivering his judgment, said, "It is clear, that a mortgagee ought not to be charged with deterioration arising in the ordinary way, by reason of houses and buildings of a perishable nature, decaying by ruin, as was the case in Anstruther," (above cited). He added, "I think, also, that a mortgagee ought not to be charged exactly with the same degree of care as a man is supposed to take, who keeps the possession of his own property. But if there be gross negligence, by which the property is depreciated in value, the mortgagee,

there is the stronger reason for this doctrine, because it is also the default of the mortgagor himself, if he does not take care to have suitable repairs made, to preserve his own property. In the present case, however, the point does not arise, for there is no evidence in the Master's Report, which establishes any fact of wilful default or gross negligence in the mortgagee.

5. These remarks dispose also of the fifth exception, which is founded upon the supposed dilapidations of the buildings, while in possession of the mortgagee. There is no proof whatever, that these were caused by his wilful default or gross negligence; but they were the silent effects of waste and decay from time.

6, 7, 8, 10. The sixth, seventh, eighth, and tenth exceptions are disposed of by two simple considerations. (1.) They all relate to matter which had been already disposed of in a former suit (*Dexter* v. *Arnold*, 5 Mason R. 304). (2.) If Thomas Arnold (the intestate) was accountable at all for any of these matters, he was so in a suit brought against him as agent or administrator of Jonathan Arnold, and not in this suit, which is merely a bill to redeem a mortgage.

9. The ninth exception admits of the same answer, with this additional consideration, that the facts referred to in it are not stated in the Master's Report.

11. The eleventh exception proceeds upon the objection, that the Master has allowed interest, where none was due. This exception proceeds upon the supposition, that the second and third exceptions were well founded. We have already decided, that the Master was right in holding the consideration stated in the mortgage deed to be the true sum due, as ascertained in the account settled in 1801.

---

who is in possession, is trustee to the mortgagor to that extent, that he ought to be made responsible for the deterioration during the time of his possession."

[The above has been added since the original opinion was given by Mr. Justice Story.]

12. The twelfth exception is, because the books of Thomas Arnold were not produced before the Master, or required by him to be produced. This is founded in a clear mistake; for the affidavits of Anna Arnold and James Arnold establish the fact, that they were produced.

13. The thirteenth exception is to the supposed denial to the plaintiffs of the right of examining the books of Thomas Arnold, produced under notice before the Master. This exception has no facts, on which to rest it in the Master's Report. The plaintiffs had no right to examine those books generally; but only such parts as related to entries, charges and accounts relative to the matters in controversy in the suit. If we pass aside from the Master's Report, it appears by the affidavits, already alluded to, that a full examination, as to these matters, was allowed, so far as any of the books contained entries, charges, or accounts relative thereto.

14. The fourteenth exception is, that the Report states no reason for the refusal of Samuel G. Arnold to join in making repairs on the premises. That was not necessary. It was mere matter of evidence for the consideration of the Master, in examining the point, whether there was any wilful default, or gross negligence of the mortgagee in not making repairs upon the premises.

15. The fifteenth exception is to the refusal of the Master to open the account settled in March, 1801. No leave was given to surcharge or falsify that account before the master; and after the long lapse of time and the circumstances stated by the Master, that that account had been already adjudicated upon by this Court in a former suit, we have no doubt, that he was right in his refusal to open the account.[1]

16. The sixteenth and last exception is, that the rents allow-

[1] See 1 Powell on Mortgages, by Coventry & Rand, 390, (a), note. *Chalmer* v. *Bradley*, 1 Jac. & Walk. 66.

ed by the Master are too low. There is no evidence of that; and we are well satisfied with his report on that head.

Let us in the next place proceed to the consideration of the exceptions of the defendants.

1. The first exception is, because the master has charged Thomas Arnold's estate with one third of the amount received by him upon the sale of the Fox Point Lots. These lots were a part of the premises included in the mortgage now in question; and Thomas Arnold had sold them in December, 1810, as his own property, by an absolute deed. In that deed there is a covenant of general warranty. The argument of the defendants is; first, that this covenant of warranty formed a part of the consideration and price given by the purchaser for the store lots; and secondly, that as the conveyance was absolute, and not an assignment of the mortgage to the purchaser, the representatives of Jonathan Arnold are not now entitled to any part of that price. We think, that the Master was right, and that the reasons stated by him for his judgment are sound. Thomas Arnold, the mortgagee, could not lawfully sell this one third of the premises except under his mortgage. In selling an absolute estate to the purchaser, he was guilty of a fraud and wrong upon the mortgagor; and he ought not now to be permitted to take any benefit or advantage from that misconduct. The covenant of warranty makes no difference in the principles applicable to the case. The deed, though absolute in its form, operated as a conveyance of a defeasible title only to the purchaser as to this one third, and not as a disseisin, as between the mortgagor and mortgagee. The case is precisely the same, in legal effect, between the present parties, as if the mortgagee had elected to sell the one third for the benefit of the mortgagor, who subsequently adopted the act.

2. The second exception is, that the decree was, that the Master should take an account of the rents and profits *received*, by the mortgagee, whereas the Master has allowed rents and

profits not received by him. The Master was right. In the first place the mortgagee kept no proper accounts of the rents and profits received by him; and, therefore, upon general principles, he was properly chargeable with what he might have received, and must be presumed to have received. In the next place, if the mortgagee was in the personal occupation of the premises, or of any part thereof, he was justly chargeable with an occupation rent, which might properly be considered, under such circumstances, as received by him, in the sense of the decree.[1] There is more of technical nicety than solid justice in this exception, and we should not be disposed to encourage it, when it had no bearing on the merits.

3. The third exception is, that the Master has allowed a much larger amount of rents than is contained in the accounts of the administratrix of the mortgagee, and admitted to have been received by him. We are of opinion, that the Master was right, for the reasons stated by him. The mortgagee kept no regular accounts; and the Master has, therefore, been compelled to exercise a sound discretion upon the whole evidence as to the amount, with which he should be charged for rents and profits. The doctrine contained in *Hughes* v. *Williams*, (12 Ves. 493), and in *Williams* v. *Price* (1 Powell on Mort. by Coventry & Rand, 949 (a), note; S. C. 1 Sim. & Stu. 581), and *Anon.* (1 Vern. R. 45) shows the true grounds, on which Courts of Equity proceed in cases of this nature.

4. The fourth exception insists, that the Master should not have estimated the rents, for which the mortgagee is charged upon his general judgment; but should have charged only such a rent as might have been obtained by a letting at public auction. We think otherwise. The Master was bound to charge the mortgagee with a reasonable rent. What, under all the circumstances, was a reasonable rent was matter for the exer-

[1] See *Wilson* v. *Metcalf*, 1 Russ. R. 530. 3 Powell on Mortgages, by Coventry & Rand, 946 (a), 948 (b), 949, and note.

cise of a sound discretion, upon all the circumstances of the case. An auction rent would not in many cases afford either a just or a satisfactory standard of the real value, for which the premises might be let, or at which the mortgagee should be entitled to occupy them.

5. The fifth exception is, that the Master has reported, that Thomas Arnold kept no regular accounts, which is an incorrect statement. We see no proof of that. The Master was the proper judge of that fact upon examining the books and the other evidence in the case. There is no evidence before us, that establishes in the slightest degree, that his conclusion was incorrect.

6. The sixth exception is founded on the supposed incorrectness of the charge of cellar rent. But there is not any evidence whatsoever upon the face of the Report, which shows any such error of the Master; and, therefore, the Report must stand. We cannot presume errors, or go into evidence in support of them, which was not laid before the Master, or brought by him to the notice of the Court. Exceptions must be made to matters apparent upon the face of the Report, or upon the accompanying documents and proofs laid before the Court upon the allegations and objections of the parties.

7, 8, 9, 10, 11. All the other exceptions are founded in objections to the Master's estimate and allowance of rents charged against the mortgagee. We are of opinion that, upon the circumstances stated in his Report, that estimate was perfectly just and reasonable. It was a matter for his judgment; and there are no facts in the case, which impugn the propriety or soundness of his conclusions.

Upon the whole our judgment is, that all the exceptions on both sides ought to be overruled, and the Report ought to stand confirmed.

Decree accordingly.

Mem.—The Decree was as follows:

This cause came on to be heard on the Report of the Master, and the exceptions filed by the parties, and was argued by counsel, on consideration whereof it was ordered, adjudged, and decreed by the Court that the exceptions, filed by the parties respectively, be, and the same are hereby overruled, and that the Report of the Master do stand confirmed, and thereupon it is further ordered by the Court, that the plaintiff be at liberty to redeem the said premises by paying to the defendants the said sum of $1366 66, being the sum reported by the said Master to be due on the said mortgage (together with interest thereon until the same is paid at six per cent.), within ninety days from the day of rendering of this decree; otherwise, that plaintiffs be foreclosed of their right of redemption. And if any of the plaintiffs shall pay towards the redemption of the said mortgage more than his proportion of the money due thereon, he shall be deemed to have a lien thereon to the extent of the moneys so paid by him more than his proportion thereof, and that the plaintiffs do recover their full costs in the premises.

CIRCUIT COURT OF THE UNITED STATES.

Spring Circuit.

MAINE, MAY TERM, 1835, AT PORTLAND.

BEFORE { Hon. JOSEPH STORY, Associate Justice of the Supreme Court.
Hon. ASHUR WARE, District Judge.

ABRAHAM F. HOWE AND ANOTHER

v.

JOHN H. SHEPPARD, ADMINISTRATOR OF ABIEL WOOD.

The Statute of 1797, ch. 74, giving a priority to debts of the United States in cases of insolvency, applies to equitable as well as *legal* debts.

But the United States cannot enforce such priority in a suit *at law*, as assignee of a judgment of a private creditor of the insolvent debtor, where the suit is brought in the name of the creditor, and not in the name of the United States.

Quære—Whether the United States may not sue at law as assignee of a chose in action or debt, as such an assignment in case of the Crown would, by the common law, vest a legal title.

THIS action was debt, brought on the 14th of December, A. D. 1830, by the United States, in the name of Howe & Howard, on a judgment recovered against Abiel Wood, at a Court of Common Pleas, holden at Boston, in the Commonwealth of Massachusetts, on the first Tuesday of January, A. D. 1821, for $4663 31, the whole of which judgment was, on the 2d day of September, A. D. 1830, duly assigned to the United States by

Howe & Howard, in part satisfaction of several judgments recovered by the United States against Howe & Howard, on their duty bonds; and Howe & Howard were released from an equal amount of their debts due the United States. The writ was duly served on Wood, and all his real estate attached on the 23d of March, 1831, when he was duly notified of said assignment to the United States. The action was entered at the Circuit Court, holden at Portland in May, 1831, and has been continued from term to term, awaiting the action of Congress on a petition there pending for the relief of said Wood. On the 26th day of October, A. D. 1834, the said Wood died, and on the 10th day of November, 1834, administration was duly granted to John H. Sheppard, who has represented said estate insolvent,—and said estate is absolutely insolvent. On the 10th day of December, 1834, said administrator was notified of the pendency of this suit of the United States, and that the United States claimed priority of payment of such judgment as should be rendered on this suit, out of the effects of said Wood—all which effects are still in the hands of the administrator.

The question now submitted to the Court, on an agreed statement of facts, the substance of which is given above, was; Whether the United States were entitled to priority of payment out of the effects of the said Wood, in the hands of his said administrator?

Anderson, District Attorney, for the United States, argued; that, as the whole judgment against Wood was assigned to the United States for a full and valuable consideration, and notice of the assignment duly given to Wood, he became indebted to the United States to the amount due on said judgment.[1] If the debt ascertained by the judgment as due from Wood to Howe & Howard became, by the assignment, a debt due to the United

[1] *Welsh* v. *Mandeville*, 1 Wheaton, 233. *Mandeville* v. *Welsh*, 5 Wheaton, 277. *Steele* v. *Phœnix Insurance Co.*, 3 Binney R. 312.

States, Wood became a debtor to the United States; and, by the 5th sect. of the Act of 1797, the United States are entitled to priority of payment out of his effects, now in the hands of his administrator. In the case *United States* v. *Fisher et al.*, assignees of Blight (2 Cranch R. 358), the Court say, "On this subject it is to be remarked, that no lien attached by this law; no *bona fide* transfer of property, in the ordinary course of business, is overreached. It is only priority in payment, which, under different modifications, is a regulation in common use, and this priority is limited to a particular state of things, when the debtor is living, though it takes *effect generally if he be dead.*" In this case, Blight was the endorser of a bill of exchange, which the United States had purchased in the market. If the United States claim priority out of the effects of an endorsee of a protested bill of exchange, which they purchase in the market, they surely may claim priority on an endorser or maker of a promissory note, purchased under like circumstances. The United States have as full and entire an interest in the debt due from Wood to Howe & Howard, by the *assignment of the judgment*, as they would have had, had Howe & Howard *assigned the note on which the judgment* is founded; and if the *United States* would *have claimed priority as endorsees* of the *note*, must they not hold it as *assignees of the judgment* on that note? Wood could not complain. He had as much election as to who should be his creditor in the one case as the other. His paper was liable to assignment,—the judgment on that paper is liable to no more. The action being in the name of the assignors, gives the defendant the benefit of all off-sets he had against the assignors before notice of the assignment, besides he has the benefit of all off-sets he may have against the assignee. *Corser* v. *Craig* (1 Wash. C. C. R. 424).

If the priority is not sustained because the action is not in the name of the United States, then a distinction must be made between the interest of the assignee of a judgment on a note of

hand or bill of exchange, and that of the endorsee of the note or bill on which such judgment is rendered; for, whether the action is in the name of the United States, or in the name of their assignors, the interest of the United States is the same, and that interest is not effectually protected if such distinction prevails. The United States prosecute all actions in the name of the Postmaster General, for debts due them through the Post Office Department. But the United States are no more party in interest in these actions than they are in this. If they may claim priority of payment out of the effects of an insolvent debtor to the Post Office Department, on a judgment in the name of the Postmaster General, may they not claim the same priority of payment of this judgment in which they have as entire an interest? In *Hunter* v. *United States* (5 Peters R. 172), it is said, "If the right of the United States to priority of payment covers any part of the property of an insolvent, it must extend to the whole until the debt is paid." It must then extend to a debtor's debtor. Priority must cover enough of a debtor's effects, wherever situated, whether in his own hands or hands of his debtor, to satisfy the debt due the United States, or it cannot be said to extend to all the debtor's effects. The argument that the debtor, or other creditors of the debtor may suffer inconvenience, or perhaps damage, by such priority, where the United States becomes a creditor by assignment, cannot prevail against the "clear and unambiguous words of the law." And it is well known to all merchants, that the United States is at all times the largest creditor in the market, and most probably to be met by them in every distribution of an insolvent's effects,—and knowing from the beginning the rules governing the action of this creditor, they have no right to complain of his severity, provided it is uniformly exercised. If priority does not extend to a debtor's effects in the hands of his debtor, then it is limited to effects in possession, and does not extend to choses in action, which limitation is denied in the case of *Hunter* v. *United States*

(5 Peters R. 172). By the rigid rules of the ancient common law, no chose in action could be assigned, save by the King, but the necessities of commerce and the good sense of the times have, from time to time, removed the restrictions and limitations formerly put on the assignee, and he is now invested with all the rights, subject to offset against the assignor, that he would have if the action was in his own name. See *Masters* v. *Miller*, 4 Term R. 341.

John H. Sheppard pro se, contended; that the question of priority must depend on the construction of the Act of Congress of March 3d, 1797, vol. 3, 423, and particularly of the 5th sect. of this Act, as follows: "And be it further enacted, that where any revenue officer, or *other person*, hereafter *becoming indebted* to the United States by bond *or otherwise*, shall become insolvent, or where the estate of any *deceased debtor*, in the hands of executors or administrators, shall be insufficient to pay all the debts due from the deceased, *the debt due* to the United States shall be first satisfied." The defendant is not a debtor to the United States, within the spirit and meaning of this Act; nor did the deceased *become indebted* to the United States, by bond *or otherwise* in the above suit.

1. It does not appear of *record* that defendant *is the debtor*. The plaintiffs are private citizens. The United States are not named in the writ, nor in the judgment which must follow the writ. Nor can they be in the examination. If defendant is then *a debtor* to the United States, it must be *by construction*, *indirectly* and *not directly*—by *equity*, not *by law*—and by an *ex post facto* transaction, and not by *the original contract*. And the plaintiffs are consequently to be ascertained not *by record*, but by *matter in pais*.

2. There is no *express* promise to pay this debt to the United States, by the defendant. Nor could the law raise an *implied*

one. If so, the United States might have brought the suit in their own name. *Coolidge* v. *Ruggles*, 15 Mass. R. 387; *Somes* v. *Skinner*, 14 Mass. R. 108; *Doctor and Student*, Ch. 24, p. 181. Lawes on Pleading in Assumpsit, 53, (Story's Edit.)

3. It then becomes necessary to examine the legal effect of the assignment of a *chose in action.* It is an universal principle, recognised without exception in all the United States and State Reports, that *an assignment of a chose in action* with notice, gives the assignee *an equitable interest*, which the Court will protect. *Welch* v. *Mandeville*, 1 Wheaton R. 233, and *Dunn* v. *Snell et al.* 15 Mass. R. 481. Is the defendant made by this assignment *a debtor* to the assignee? The decisions do not go to this extent. See *Dunn* v. *Snell*, 15 Mass. R. 481; *Bebee* v. *Bank of New York*, 1 John. R. 528, 552; 1 Madd. Chanc. Prac. 547; 2 Black. Com. 442; 2 Comyn Cont. 509; Shep. Touchstone, ch. 12, p. 239; 5 Pick. R. 259, 266, 267; 2 Vernon R. 699 *in note;* 1 P. Williams R. 782; 2 Str. R. 899; 1 Dane Abr. 289, cap. 14, s. 21.

By the foregoing authorities, it appears that the assignee acquires no new rights—that he stands only in the place of the assignor—that there is no change of the process of the Court—that he only appears as an *attorney of the assignor*, irrevocable, and not as a party, and that the debtor's liabilities and property are not altered nor more exposed, by an assignment of his creditor. The assignee has not even *the legal*, but only *an equitable* or *beneficial interest.* While his rights are protected in obtaining the fruits of his judgment, the debtor's funds or estate, are subjected to no diversion nor inconvenience, other than would have occurred if no assignment had ever been made. For if the defendant could be made the debtor of the assignee, this action is wrongly brought; the United States should have been plaintiffs of record.

4. The construction of the king's prerogative in England, favors the defendant's view of the case. Bacon Abr. vol. v.

title Prerogative E. p. 554; Comyns Dig. Assignment D.; 5 Petersdorff Abr. 283, Chose in Action. The prerogative of the king is always exercised tenderly, it would seem. For in 1 Maddock Ch. Prac. 619, it is said, "If there be a debt owing to the king, the Court will direct the king's debt to be satisfied out of the *real estate*, that the other creditors may be let in to have a satisfaction *out of the personal estate.*" "The little finger of the law," says Eunomus, Dialogue I, vol. i. "is heavier than the loins of the prerogative."

The case of the *United States* v. *Fisher*, 2 Cranch R. 358, does not settle this question against the defendant. It was there decided that priority extends *to all debtors* of the United States, whether revenue officers, bondsmen or endorsers of bills of exchange. The defence was, that debtors for public dues, receiptors of public moneys, and accountable agents, were only intended to be included in this *statute prerogative* of our republic, as it may well be called. C. J. *Marshall* regarded the question as not without embarrassment. *Washington* J. dissented from the opinion of the Court, who decided that *all debtors* to the United States were included. That case does not touch the present, as the suit there was in behalf of the United States; the record showed that defendant was plaintiff's debtor; the debt was originally contracted with the United States, and the pleadings showed the parties. The defendant in the present case never *was a debtor to the United States.* The record shows different parties—and an averment against a record is bad pleading. Coke Litt. 260, *a.* Indeed if the debt had been less than $500, it might have been questioned, if the United States would not have been compelled to come into our State Courts for relief in this suit. As to *Masters* v. *Miller*, 4 Term R. 341, Mr. Justice *Buller's* opinion was overruled by the rest of the Court; at least they thought the form of the action *was essential.*

Priority in a case like this would operate severely on honest

creditors. It would open the door to fraud and collusion among collectors and debtors to the United States. The Government, by a secret purchase, might slily and suddenly step in as an assignee, and sweep all a debtor's property beyond the reach of other creditors. A principle so harsh and severe, would be more dangerous, than the prerogative of the British king, which Lord Coke says, is not allowed by common law to be exercised to the injury of a subject.

STORY J. This case comes before the Court upon an agreed statement of facts; and the object is to ascertain, whether, as the estate of Abiel Wood is insolvent, the United States have a right to priority of satisfaction out of his assets, for the judgment debt of the plaintiffs (A. F. Howe and another), which was obtained against Wood, and assigned by the plaintiffs to the United States, in the life-time of Wood.

The question, intended to be raised, is not, whether in this form of action (a suit at law on the judgment, brought in the name of the judgment creditors for the benefit of the United States), the priority of the United States can be insisted on. If that were the point, we should have no hesitation in saying it could not; for nothing in the suit can judicially be taken notice of, which shall distinguish the case of the plaintiffs from that of other private judgment creditors, as to rights or remedies. But the real question is, whether in any form of suit, at law or in equity, the United States can, upon such a debt, so assigned to them, insist upon the statute priority.

I am by no means satisfied, that this is not a case, where at law, the Government might sue the debtor directly upon the assigned judgment in their own name. For at the common law, though choses in action are not assignable, yet in the case of the King, there is an exception; for upon an assignment of a chose in action to the King, he is allowed to sue the debtor in his own name. This is not so much a matter of preroga-

tive, as an exception coeval with the rule, as to the non-assignability of choses in action. So the doctrine is laid down in *Mills* v. *Williams* (1 P. Will. 252), which cites, 21 Hen. 7, 19. Lord Chief Baron *Comyns* lays down the same doctrine in the clearest terms.[1] And I have a strong impression, that the same doctrine has been recognised, incidentally, by the Supreme Court of the United States.

But this point is not important to be determined in the present case; because it is clear, that the assignment of the judgment did in equity transfer the debt to the United States; and the Government might, by a bill in equity, have enforced the judgment against the debtor. The question, then, comes to this, whether the Statute of 1797, ch. 74, giving priority to the Government in the payment of debts, applies to legal debts only, or to debts both legal and equitable. The fifth section of that Statute declares "That where any revenue officer or other person becoming indebted to the United States, by bond *or otherwise*, shall become insolvent, or where the estate of any deceased *debtor*, in the hands of executors or administrators, shall be insufficient to pay all the *debts* due from the deceased, the *debt* due to the United States shall be first satisfied, &c. Now, in this language, there is not the slightest distinction made between equitable and legal debts. If an equitable debt is due to the United States, is it to be wholly excluded from any payment out of the assets? If such debt is payable out of the assets, what is the order of payment? Is it to be postponed to other legal creditors; or paid *pari passu* with them? The Statute is silent as to any marshalling of assets, except in cases of priority; and it gives that priority in all cases of debts. The words of the Statute seem to extend to all cases of debts due to the United States from an insolvent debtor's estate; and if payable at all

[1] See also Comyns Dig. Assignment. D.

out of his assets, the rule of priority seems co-extensive with the duty of the executor or administrator to pay.

By laws of Maine (and Massachusetts has the same rule), there is no difference in the dignity of debts. All are equally payable out of the assets, *pari passu*. And in regard to private creditors, no distinction is taken between equitable and legal debts, any more than between legal and equitable assets. I know of no ground, upon which equitable debts are, or can be excluded from a proportionate dividend of the assets, when such debts are due to private creditors. How, then, can a different rule be applied to equitable debts due to the United States? In the sense of the laws of Maine, and in the sense of the laws of the United States, they are still *debts*. Suppose an estate solvent as to the payment of legal debts, but not as to the payment of equitable debts also, can it be treated as other than an insolvent estate? And, if insolvent, are not the United States necessarily entitled to a priority as to all their debts by the very terms of the Statute?

After reflecting much upon the subject, I am unable to arrive at any other conclusion, than that the priority of the United States attaches to all debts, equitable, as well as legal. Upon any other construction, I cannot perceive, how they are entitled to any payment whatsoever, out of the assets for equitable debts. If they are not debts against the estate in cases of insolvency, neither can they be deemed such in cases of solvent estates, a conclusion which would overturn the best established principles.

The District Judge concurs in the opinions, which I have thus expressed. The case has been exceedingly well argued, and with great ingenuity. But, after all, it comes back to the simple question already stated.

According to the agreement of the parties, the cause will stand continued, in order to enable the administrator to perfect his application for relief to Congress.

JESSE GORDON, IN EQUITY

v.

ARCHELAUS LEWIS AND THE PORTLAND MANUFACTURING COMPANY.

Whatever has been insisted upon before the Master, is considered as waived or abandoned, if it is not made matter of exception; unless it appears on the face of the Report, that the Master has committed an error.

Where the defendant recovered and occupied premises, as assignee of the original mortgagee, he must be deemed to have received the rents and profits under that title; and he cannot set up an adverse title against the mortgagor or his assignees, to protect himself from accountability therefor.

Where a mortgagee is in possession, and the annual rents and profits, of the mortgaged premises exceed the interest of the debt due, it *seems*, that he should pay interest on the surplus rents and profits.

In ordinary cases, where the relation of mortgagor and mortgagee is uncontroverted, if a mortgagee receive the rents of a mortgaged estate, after his debt has been satisfied, and retain them to his own use, without paying them over to the mortgagor, he is chargeable with interest.

If, however, there are sufficient equitable circumstances in favor of the mortgagee, as if he retained the rents under a mistake, supposing the rights of the mortgagor extinguished, he would not be liable for interest, until after notice of the adverse claim.

No allowance is made for expenditures on mortgaged premises, if the value of the premises is not enhanced thereby.

Where the answer of the defendants asserts a mortgage title in the whole of the premises, it is not competent for them to set up a different title, as for a moiety, before the master.

Courts of Equity follow the law in matters of set-off, unless there is some Equity attaching to the particular transactions between the parties.

The surplus rents and profits, after the satisfaction of the mortgage debt, may be assigned as a *chose in action*, and the assignee maintain a suit in equity for an account.

In the view of a Court of Equity, the rents and profits are incidents *de jure* to the ownership of the Equity of redemption.

A second mortgagee, after the satisfaction of the first mortgage, may claim from the first mortgagee, after notice, the rents and profits, which have not been accounted for to the mortgagor, so far as the same are necessary to the satisfaction of his mortgage.

Webb mortgaged certain premises in 1808, to Haskell; Haskell in 1816 assigned his mortgage to the defendant Lewis; Lewis in 1831 assigned the same to the Portland Manufacturing Co. The mortgagor Webb in 1812, conveyed the mortgaged premises to John Gordon, who, in 1832, conveyed the same to the plaintiff. *Held*, that no decree can be made for the payment of the rents and profits to the plaintiff, until an opportunity has been given by supplemental proceedings for Webb and the other parties in interest to appear.

A mortgagee shall not get any advantage out of the mortgage fund beyond principal and interest.

Between mortgagor and mortgagee, the latter, when in possession, must account for the actual rents and profits, if they can be ascertained; if they cannot be, then resort may be had to a fair occupation rent.

THIS is a bill in Equity to redeem certain mortgaged premises, brought by the plaintiff, as assignee of the mortgagor of the mortgaged premises, against the defendants, as assignees of the mortgagee. The bill charges, that Joshua Webb, on November 1st, 1808, mortgaged the premises to Mark Haskell; Haskell on the 31st of August, 1816, assigned the mortgage to the defendant, Lewis; and Lewis assigned the same to the Portland Manufacturing Company, on the 3d of August, 1831. It further charges, that the mortgagor, Webb, on the 14th of April, 1812, conveyed the mortgaged premises to John Gordon; and that John Gordon, on the 23d of January, 1832, conveyed the same to the plaintiff. It then alleges a tender, &c. &c., and prays an account and redemption.

The answers of the defendants admit the mortgage of the premises, excepting an old gristmill, which is said to have belonged to Jonathan Webb, and the assignment of the same mortgage, as charged in the bill. They require proof of the plaintiff's title; and then assert, as matter of defence, an entry into the premises after condition broken, for the purpose of foreclosure by Lewis on, or from and after the 16th of August, 1816, and open, and visible, and exclusive possession by him of the same for more than three years thereafter, and until his conveyance to the Company, whereby he acquired an absolute title

under such entry and foreclosure; and then denies the right to any account, &c. &c.

The cause was heard in May Term, 1834, on the bill and answer, and a decree was awarded (see S. C. 1 Sumner R. 524), for a redemption of the mortgage, and for taking an account according to the prayer of the bill; and the cause was referred to a master to take an account, and to make due report thereof to the Court. At this term, the cause came up again on exceptions taken by the defendants to the Master's report. The nature of the report, and the exceptions thereto, will sufficiently appear in the opinion of the Court.

The cause was argued in writing by *C. S. Davis* for the plaintiffs; and *S. Greenleaf* for the defendants.

Story J. delivered the opinion of the Court as follows. This cause has now come before us, upon the Master's last Report, made since the subject has been recommitted to him, in pursuance of the order of the Court on the 21st of January last; and upon the exceptions filed by the defendants to that Report.

I shall examine the exceptions in the order, in which they stand, and not in the order, in which they have been brought before the Court by the defendant's counsel, in the argument at the bar. Before, however, I proceed to that examination, it is proper to state, that nothing is properly before the Court, except the matter of those exceptions; for whatever may have been insisted upon before the Master, by way of argument or objection, is considered as waived or abandoned, if it is not made matter of exception, unless, indeed, it manifestly appears upon the face of the Report itself, that the master has committed an error, which ought to be corrected. I mention this the more freely, because the argument of the defendant's counsel has insisted upon some matters, which were taken by way of objection or reasoning at the hearing before the Master, and which are not directly within the scope of any of the exceptions to the

Report; and certainly, unless such objections appear now maintainable upon the very face of the facts contained in the Report, they must be deemed to have been abandoned.

The first exception respects the allowance, made by the Master, of the rents and profits of the Little Revenge Mill. The decision of the Master on this point was perfectly correct. The defendant Lewis actually recovered and occupied that mill in virtue of his title as assignee of Haskell, the original mortgagee, and he must be deemed to have received the rents and profits under that title, and to be accountable accordingly. He cannot now be permitted to set up an adverse title against the mortgagor or his assignees, to protect himself from such accountability. The reasoning of the Master on this point is entirely satisfactory.

The second exception in its actual form is equally unmaintainable. It is, that the Master has not stated the evidence or mode of acquisition of Lewis's title to the said mill, although it was exhibited before him. Now, certainly, it was no part of the Master's duty, under his commission, to ascertain or report such title. That title, so far as it was put in issue by the bill and answer, had been already passed upon by the Court; and was not within the scope of his commission. There are no facts in the Report, which bring this exception before the Court, or justify it.

The third exception is to the allowance of interest on the rents and profits, and making annual rests, and charging interest on the value of the premises. The commission of the Master expressly authorized him "to cast interest on the rents and profits, making proper rests." He has cast interest accordingly; and if any rests were proper, annual rests were undoubtedly to be made. There is no error, therefore, on these points in the Master's Report. The question is necessarily open upon the Report, and is reserved for the Court to decide, whether such interest is allowable or not. The other part of the exception, (as to charging interest on the value of the premises), seems unfounded in fact, unless it refers to the interest allowed as an

occupation rent, or such as might have been received by the Portland Manufacturing Company after their purchases. If it does so refer, then it is governed by the remarks already made. The proper construction of the Master's Report seems to be, that he allowed the interest as an occupation rent. The question, then, which alone is left for consideration under this head, is, whether interest ought, upon the whole circumstances of the case, to be charged upon the annual rests of rents and profits. It appears by the Master's Report, that the mortgage was in fact extinguished by payment from the rents and profits on the 23d of April, 1818. The question as to interest seems narrowed down, by the argument, to the period, which has since elapsed. It could scarcely admit of doubt, that as to the antecedent period the Report of the Master was as favorable to the defendants, as the principles of a Court of Equity would allow. Where a mortgagee is in possession, taking the rents and profits, and these annually exceed the annual interest of the debt on the mortgage, there is the strongest reason for directing interest to be paid upon the surplus rents and profits, to keep pace (*pari passu*), with the interest on the debt. The case of *Shephard* v. *Elliot* (4 Madd. R. 254), *Gibson* v. *Crehore* (5 Pick. R. 160), *Saunders* v. *Frost* (5 Pick. R. 259), and *Reed v. Reed* (10 Pick. R. 398), fully support such a charge. In point of fact, however, it does not appear by the Report, that any interest was allowed on the rents and profits during the antecedent period.

There is great good sense in the doctrine held by Lord *Gifford*, in *Wilson* v. *Metcalf* (1 Russ. R. 535), that if a mortgagee, receiving the rents of a mortgaged estate, after his debt has been satisfied, does not immediately pay them over to the mortgagor, but retains them to his own use, he is availing himself of another man's money, and ought to be charged with interest; and that it makes no difference, whether he is receiving such rents, or is charged with an occupation rent. The case of *Quar-*

rell v. *Beckford* (1 Madd. R. 269), turned upon similar considerations.[1] As a general rule it appears to me, that this doctrine ought, in the ordinary cases of persons standing in the admitted relation of mortgagor and mortgagee, to be adopted. But it is but a general rule. There must be some exceptions to it, where it would be inequitable to make such a charge. And I cannot but think, that the proper cases for such a charge are those only, where there is a present duty to pay over the rents and profits, arising from the uncontroverted relation of mortgagor and mortgagee. If the mortgagee has reason *bonâ fide* to treat the rights of the mortgagor as extinguished; or if he *bonâ fide* supposes himself, under circumstances, fairly authorizing such a belief, to be the absolute owner of the premises; it seems to me, that he is not to be affected with interest, if it turns out in the event, that he is under a mistake, as to his absolute title; for he has not knowingly deviated from his proper duty. In such a case, it seems to me, that the right to interest does not accrue, until some demand is made upon him, or some notice given of the claim; and then interest may properly be charged from that period. Now, it is very certain, in the present case, that no claim or notice was brought home to the defendant, Lewis, by John Gordon (the second mortgagee or assignee of the mortgagor), while he held the estate; nor by the plaintiff until the time when he brought the present suit, in March, 1832. The original mortgage by Webb to Haskell was in November, 1808, the assignment of it by Haskell to Lewis in August, 1816, and the conveyance by Lewis to the Portland Manufacturing Company in August, 1831. John Gordon's title, as second mortgagee, commenced in April, 1812; and the plaintiff's title, as his assignee, in January, 1832. No demand was ever made by John Gordon against Haskell or Lewis, or the Manu-

[1] See also *Davis* v. *May*, Cooper Eq. Pl. 238. S. C. 19 Ves. 382, *Archdeacon* v. *Bowes*, 13 Price. R. 369.

facturing Company, during a period of nearly twenty years after the commencement of his title. And taking the other facts in the case, as they appeared at the original hearing, the adverse title under certain levies by execution, and the entry for a foreclosure (though neither became effectual in point of law), and the long and undisturbed possession by Lewis, ever since August, 1816, I am not satisfied, that Lewis had not a right to treat the equity of redemption as being abandoned, or at least as not worth reclaiming. I see no reason, therefore, for holding the plaintiff entitled to any interest, under all the circumstances of this case. Interest is not of course; and is allowable only, when the mortgagor or his assignee makes out a strong case in equity. The case of *Archdeacon* v. *Bowes* (13 Price R. 353), and *Quarrell* v. *Beckford* (1 Madd. 269), establish, that interest is not of course from the period, when there is a surplus in the hands of the mortgagee; but where there are any equitable circumstances it will be confined to the period of notice. In this very case, the plaintiff himself does not in his bill set up any averment, that the mortgage has been paid, or that any surplus is in the hands of the mortgagee. On the contrary, he has tendered in Court a sum as still due on the mortgage. My opinion, on the whole, is, that under all the circumstances of this case, interest ought not to be allowed.

The fourth exception is, that the defendants are not allowed for the improvements made by the Portland Manufacturing Company after their purchase; and that the Master has not stated the evidence thereof. It does not appear by the Report, that the Master was requested to state the evidence on this point. The Master does, however, state, that the Company have expended money on the privilege by the erection of a dam in a place different from that, where the old dam of the Haskell saw-mill stood (principally from the materials of the old dam), but, that he is not satisfied, that the value of the mortgaged premises has been increased thereby. Now, under

such circumstances, it is clear, that the company are entitled to no allowance for such expenditures; for they have made no lasting or beneficial improvements on the estate.[1] This exception ought, therefore, to be overruled.

The fifth exception is, that the defendants are charged with the rents and profits of the whole of the tracts described in the deed, whereas (as is said) one half only of the same was mortgaged, and the evidence thereof was before the Master. The bill asserts, substantially, a title in the defendants to the whole tracts described in the mortgage deed; and the answer of the defendants admits a title to the whole tracts described in the same deed, as held by the defendants. And upon this state of facts the original decree proceeded to direct an ascertainment of the rents and profits, &c. before the Master. When the matter came on before the Master, upon the recommittal of the Report, the defendants offered in evidence a deed, purporting to be the original mortgage deed of the 1st of November, 1808, from Webb to Haskell, in which the original words of conveyance included the whole tract; and there was an interlineation of words cutting it down to one moiety. The plaintiff objected before the Master to the admission of the deed so offered, it never having been an exhibit or filed in the cause. The Master admitted the deed, and his Report contains an alternative view of the state of the case, as the Court shall decide, whether the deed was admissible or not. My opinion is, that the deed was inadmissible as evidence to establish, that the mortgage was but of a moiety of the estate. I do not meddle with the case, as a matter of suspicion, or of question as to the genuineness or falsity of the interlineation. The true ground is, that the answers of the defendants assert a mortgage title in the whole of the premises; and it is not now competent for the

[1] See *Moore* v. *Cable*, 1 John. Ch. R. 387. *Russell* v. *Blake*, 2 Pick. R. 505. *Saunders* v. *Frost*, 5 Pick. 259, 270. *Reed* v. *Reed*, 10 Pick. 398.

defendants to set up a different or more limited title upon a collateral inquiry before the Master. That would be to contradict the answers, and to try a very different case from that asserted in the pleadings. The cause has been heard upon the bill, answers and proofs; and an interlocutory decree had; and the defendants are not now at liberty to substitute a new case for that formerly stated and already decided on. It may be their misfortune, or their fault; but it is irremediable in this stage of the cause. The exception, therefore, is unmaintainable, and the Report of the Master must stand as to the rents and profits of the whole of the premises.

The sixth exception is in substance an objection to the title of the plaintiff to recover or receive the surplus rents and profits accruing after the satisfaction of the first mortgage, and before the conveyance to him in January, 1832. And, in support of this objection it is asserted, that John Gordon is insolvent, and was, at the time of the accruing of these rents, largely indebted to Lewis, and that he had a right of set-off against such surplus of his debt so due. Now, it might be a sufficient answer to this suggestion, that the Master reports, that the plaintiff denied any such indebtment, and no proof was offered before him to establish the fact clearly; therefore, the suggestion of indebtment and right of set-off must, under such circumstances, be treated as a new unfounded claim. But if there had been proofs of such an indebtment, still it would not follow, that the right of set-off would exist. There is no pretence to say, that such a set-off to the mortgagor's claim would be allowable at law. In matters of set-off Courts of Equity generally follow the law, unless there is some equity attaching to the particular transactions between the parties; such as mutual credits. Upon this I need do no more than to refer to the authorities, which were acted upon in *Jackson* v. *Robinson* (3 Mason R. 138), and *Green* v. *Darling* (5 Mason R. 201). In the present case there is no pretence of any mutual credit; that is to say, of any

credit given by Lewis to John Gordon, on account of the supposed debt due from Lewis to Gordon for rents. The whole structure of the answer disclaims any such intendment. It insists upon an adverse exclusive title to the mortgaged premises, and, of course, to the rents and profits.

The right of the plaintiff to the surplus rents and profits is, upon the structure of the bill, wholly dependent upon the point, whether it is an incident to the exclusive and absolute ownership of the equity of redemption. The bill does not assert any title to such rents and profits in virtue of any assignment thereof, *in verbis*, as rents and profits. Indeed (as has been already suggested), the bill not only does not suppose there to be any surplus rents and profits capable of assignment; but it supposes a balance to be due on the mortgage, and tenders a payment of it in order to a redemption. There is no question, that an assignment may be lawfully made of such surplus rents and profits, as a *chose in action*, and that the assignee may, in virtue thereof, maintain a suit in equity for an account and satisfaction under such a title by assignment. But, then, if such a title is relied on, it must be alleged in the bill, and put in issue; for the decree must be *secundum allegata et probata*, and not merely *secundum probata*. So that the present bill puts out of question all claim under any assignment of the rents and profits as such; and if the rents and profits are recoverable at all by the plaintiff, they are so as incidents to the ownership of the equity of redemption. My opinion is, that they do attach to such ownership *de jure*, in the view of a court of equity.

The mortgage to Haskell was extinguished by satisfaction out of the rents and profits, on the 23d day of April, 1818. At that time, and from thence down to January, 1832, when John Gordon conveyed the mortgaged estate to the plaintiff, he continued the qualified owner thereof, under his original mortgage deed from Webb, in April, 1812; and as such, he was entitled to the whole surplus rents and profits in the hands of the

mortgagees, under the first or Haskell mortgage, as far as his title extended; that is, as far as they were necessary to satisfy his (Gordon's) mortgage.[1] Beyond this, the surplus rents and profits belonged to Webb, the mortgagor, unless his title to the equity of redemption has since been absolutely released or extinguished. Now, the plaintiff, at most, can take no more under the assignment of John Gordon, to him, than the title of the former under his mortgage. The bill does not in terms assert any absolute title to the equity of redemption to the premises, either in John Gordon or in the plaintiffs, or any release or extinguishment of Webb's equity of redemption. It asserts, indeed, that, in virtue of the deed of the 14th of April, 1812, John Gordon "became seized of all the right, interest and estate of the said Joshua Webb, whether in fee or in equity, to redeem the same;" and then proceeds to allege, that all the right, title, interest and estate, which he (John Gordon) had in virtue of the aforesaid conveyance in the premises, was assigned to the plaintiff by the deed of the 23d day of January, 1832. But in both instances, a profert is made of these deeds by the bill, and upon the production and proofs of them, it is apparent, that the title is nothing but a mortgage title. So that the bill asserts no absolute title in the plaintiffs; and the proofs establish no extinguishment of Webb's equity of redemption. There are then no allegations or proofs of any absolute title to the premises in the plaintiff. No account has been taken to show, what is the state of accounts between the plaintiff and Webb, or to show, what is due by Webb on the mortgage to John Gordon. Webb is not even made a party to the bill. So that it is clear, that his rights and interests cannot, and ought not to be disposed of in this suit, in its present form. Under these circumstances, a decree cannot be made, directing the amount due for rents and profits to be paid over to the plaintiff. The most, that can be

[1] See *Archdeacon* v. *Bowes*, 13 Price R. 353, 362, 363, 365, 368, 373.

done, is to order this amount to be brought into court, subject to the order of the Court; and to retain the fund until an opportunity is given for all the parties in interest to appear, by supplemental proceedings, to litigate and establish their just rights thereto. I had at first some hesitation, whether, under the actual posture of the case, we ought to go quite so far. But the case of *Archdeacon* v. *Bowes* (13 Price R. 353, 373), seems to me fully to justify this proceeding; as it also conclusively establishes the right of a second mortgagee, after the satisfaction of the first mortgage, to claim from the first mortgagee, after notice, all the rents and profits, which have not been paid over or accounted for, to the mortgagor, so far as they are necessary for the satisfaction of the second mortgage.[1] Indeed, I should have entertained no doubt upon this last point, if there had been no authority to support it, upon the general principles flowing from the relationship of the parties as mortgagees.

The seventh and last exception to the Master's Report is, that he has allowed nothing for the extra exertions of Lewis, in taking care of the mortgaged property, and obtaining the rents and profits. This exception does not require any elaborate consideration. There is nothing in that Report, which establishes the right of Lewis to any compensation in taking care of the property and obtaining the rents and profits, beyond what the Master has allowed him.

I have not thought it necessary to go over the other grounds of objection to the Report, suggested at the argument. So far as they have not been already answered, they were in effect disposed of by the former opinion of the Court. For instance, the title under the levy in execution having been held void, it is impossible, in a Court of Equity, that the defendants can be permitted to avail themselves of that as an adverse title to hold

[1] See *Parker* v. *Calcraft*, 6 Madd. R. 11, 12. *Berney* v. *Sewell*, 1 Jac. & Walk. 360. *Exparte* Wilson, 2 V. & Beam. 251.

possession of the premises, when they had a good title as mortgagees to the possession, which the mortgagor and his assignees could not impugn or disturb. But, in truth, the objection is not so properly addressed to the Report itself, as it is to the former opinion of the Court, and to the order, on which that Report is founded.

Then, again, as to the rents and profits, it is contended, that the actual rents and profits ought not to be charged against the defendants, but only what is to be deemed a fair rent, by which must be understood a fair occupation rent. I know of no rule of a Court of Equity, which could justify such a course of proceeding on the part of the Court. No principle is better established than the principle, that a mortgagee shall not get any advantage out of the mortgage fund beyond his principal and interest.[1] Between mortgagor and mortgagee, the latter, when in possession, must account for the actual rents and profits received or made by him, if these rents and profits can be actually ascertained. Where they cannot be, there must be a resort to a fair occupation rent. Here the Master has ascertained the actual rents and profits. In both cases, the mortgagee may entitle himself, under circumstances, to compensation for all lasting improvements upon the premises. But in the present case, there is not the slightest proof, that the Master would have disregarded any such claim, if properly substantiated. His Report states no such fact; and justifies no such conclusion.

Upon the whole, my opinion is, that there ought to be a decree to bring the surplus rents and profits of the whole mortgaged premises into court, to abide the future orders of the Court, upon the proper supplementary proceedings. The personal representatives of Lewis are to bring into court, if they

[1] See *Gubbins* v. *Reed*, 2 Sch. & Lefr. 218. 4 Kent Comm. Lect. 58, pp. 166, 167, 2d edit. 3 Powell on Mortgages, Coventry & Rand's edit. page 949, note E. 2.

have assets, the surplus of the rents and profits, from the extinguishment of the mortgage on the 23d of April, 1818, to the time of the sale to the Portland Manufacturing Company, on the 3d of August, 1831. From that period the Portland Manufacturing Company are to bring into court the rents and profits.

As to the possession of the premises, it is plain, that a decree must pass for an immediate possession, since the original mortgage to Haskell has been long since satisfied.

A decree will be accordingly framed upon these principles, as the District Judge concurs in this opinion.

CIRCUIT COURT OF THE UNITED STATES.

Spring Circuit.

MASSACHUSETTS, MAY TERM, 1835, AT BOSTON.

BEFORE { Hon. JOSEPH STORY, Associate Justice of the Supreme Court.
Hon. JOHN DAVIS, District Judge.

THE BRIG DRACO, STANTON, NICHOLS AND WHITNEY, CLAIMANTS.

A valid Bottomry Bond may be made by the owners of a vessel, in a foreign or a home port.

The Admiralty has jurisdiction over all maritime contracts *in personam*; and also *in rem*, where there is a maritime lien or express pledge, as security; and this embraces, of course, a Bottomry Bond, given by the owner in the home port, where there is an express pledge, as security.

It is not necessary to the validity of a Bottomry Bond, made by the owner of a vessel, that the money borrowed should be advanced for the necessities of the ship, or cargo, or voyage; though it would be otherwise, where the money was borrowed by the master, *virtute officii*.

A Bottomry Bond is a contract for a loan of money on the bottom of the ship, at an extraordinary interest, upon maritime risks, to be borne by the lender, for a voyage or a definite period.

An hypothecation of a vessel, on maritime risks, draws after it a maritime lien.

A Bottomry Bond need not be recorded under the Statute of Massachusetts (1832, ch. 57), which provides for the registration of mortgages of personal property.

A valid Bottomry Bond will be upheld, where there are no laches on the part of the lender, even against a *bonâ fide* purchaser, without notice.

The Brig Draco.

A Bottomry Bond may be upon time, as well as upon a specific voyage.

If, after the risk on a Bottomry Bond has commenced, a sale or transfer of the vessel takes place, or the voyage is in any manner broken up by the borrower, the maritime risk terminates, as in the case of a policy of insurance, and the bond becomes presently payable.

Where it was expressly stipulated in a Bottomry Bond—"that the said brig, shall be delivered to no other use or purpose whatsoever, until payment of this Bond is first made;" *held*, *à fortiori*, that a sale of the brig, after the commencement of the maritime risk, terminated the risks under the Bond, and entitled the lender to an immediate right of action.

Trover would lie at common law, in favor of the lender on bottomry, against the vendee of the vessel, who, after the commencement of the maritime risk, and before the satisfaction of the Bond, had taken possession of the vessel.

LIBEL in Admiralty, by the Tremont Insurance Company, a corporation created under the authority of a charter from the Commonwealth of Massachusetts, against the brig Draco, upon an asserted Bottomry Bond. The claimants, Messrs. Stanton, Nichols and Whitney, assert in themselves title as vendees, and also other matters of defence.

The Bond in question was executed by the owners in Boston, the home port of the brig, to the Tremont Insurance Company, on January 6th, 1834, while the brig was still at sea. The following is a copy of it:

Know all men by these presents, That we, James P. Flint, Jacob C. Flint, and Sherman G. Hill, Merchants & Co., partners in trade under the name and style of P. & C. Flint & Co. as principals, and Rufus G. Norris & Joseph W. Flint, merchants and copartners in trade, under the name and style of Norris & Flint, as sureties, are held and stand firmly bound and obliged unto the Tremont Insurance Company, of Boston, in the County of Suffolk, and Commonwealth of Massachusetts, in the sum of six thousand dollars, money of the United States of America, to be paid to the said Tremont Insurance Company, their certain attorney, successors, or assigns, to which payment well and truly to be made, we bind ourselves, each of us, and

each of our heirs, executors, administrators, and assigns, and each and every of them, jointly and severally, and firmly, by these presents.

Dated at Boston, this sixth day of January in the year of our Lord, one thousand eight hundred and thirty-four.

Whereas, the Tremont Insurance Company aforesaid, have this day lent and advanced unto the said P. C. Flint & Co. the full and just sum of three thousand dollars, which is to run on Bottomry on the block, tackle and apparel of the brig Draco of Boston, whereof is Master, and of which the said P. & C. Flint & Co. are the owners, to be employed as follows: At and from the to at and from all ports and places to which she may proceed for one year, commencing the risk on the sixth day of January, one thousand eight hundred and thirty-four at noon, and to continue until the sixth day of January, one thousand eight hundred and thirty-five at noon, and no longer, unless she should be on a passage at that time, in which case the risk is to continue, until her arrival at her port of destination, and the said obligors are to pay to the said Tremont Insurance Company, interest, at the rate of six per cent. per annum, on the sum loaned, to be paid semi-annually, at the said Company's office, in Boston, and a further premium of five per cent. on the marine risk of three thousand dollars, on the said brig, valued at ten thousand dollars, for the term of one year, commencing the risk on the sixth day of January, one thousand eight hundred and thirty-four, and to continue till the sixth day of January, one thousand eight hundred and thirty-five, and at *pro rata* premium, if on a passage, until the same shall be ended.

In consideration whereof, the casualties of the seas, and all other risks enumerated in the printed form of policies, now in use, by the said Tremont Insurance Company, are to be on account of said Tremont Insurance Company, and for the further security of the said Tremont Insurance Company, the said P. & C. Flint & Co. doth by these presents mortgage and assign

over to the said Tremont Insurance Company, the whole of the said brig, and it is hereby declared, that the whole of the said brig is thus assigned over, for the security of the Bottomry taken up by the said and shall be delivered to no other use or purpose whatever, until payment of this Bond is first made, with the premium and interest that may become due thereon. And said Tremont Insurance Company is to be entitled, in case of loss, to the whole of the salvage of said brig, which the said obligors hereby promise to pay to the said Tremont Insurance Company.

Now the condition of this obligation is such, that if the above-bounden James P. Flint, Jacob C. Flint, and Sherman G. Hill, Rufus G. Norris and Joseph W. Flint, their, or either of their heirs, executors, administrators or assigns, shall and do and well and truly pay, or cause to be paid to the said Tremont Insurance Company, their certain attorney, successors or assigns, the full and just sum of three thousand dollars, being the principal of this Bond, together with the premium and interest that shall become due thereupon, at the time of the safe arrival of the said brig at her port of destination, in manner aforesaid; and in case of loss of the said brig, shall pay the whole of the salvage to the said Tremont Insurance Company, then this obligation to be void, otherwise to remain in full force and virtue.

The libel, after stating the substance of the instrument, and annexing a copy of it, proceeds to state, that in July, 1834, the sum of ninety dollars had become due on the loan, and had not been paid; that after the execution of the instrument, and in the same month of January, 1834, the firm of P. H. Flint & Co. (the borrowers on the bottomry) transferred and assigned the vessel to the present claimants, contrary to the stipulations in the instrument; that the claimants deny the interest and lien of the libellants in and on the vessel, and insist upon their free and unincumbered title; that the vessel is about to proceed to sea

on a foreign voyage; that Flint & Co. have become insolvent, and utterly unable to pay the bond; and that, by reason of the premises, the bond has become forfeited, and they therefore pray Admiralty process against the vessel, and that she may be sold to pay the sums due to them.

The answer of the claimants admits the execution of the bond, and the sale to themselves; and insists, that the Court has no jurisdiction, because it is not, in fact, a bottomry bond; that the brig was at sea, when it was given; that the sum lent, was not lent to fit out, or repair or supply the brig, or to purchase a cargo for her, or for any purpose connected with any voyage, or the navigation of the brig,—but for the general purposes of the firm, in their trade and negotiations as merchants, then residing in Boston; which facts were at the time known to the libellants. The answer further insists, that the libel is not maintainable, because the sum loaned had not as yet become due, according to the terms of the instrument; that the claimants, on the 14th of January, 1834, purchased the brig of the firm for the sum of $6006, the brig being then at sea, on a voyage from Russia to Boston; that a bill of sale was duly executed and lodged at the custom-house in Boston immediately after its execution; that the brig arrived at Boston in February, 1834, and was immediately taken possession of by the claimants, who took out a new register, and chartered her to Enoch Train and Charles W. Cartwright, in the same month of February, 1834, on a voyage for South America, on which she sailed in a few days afterwards; that the claimants, at the time of the purchase of the brig, had no notice of the asserted bond, nor until after the brig had sailed on the said voyage, and then only casually; and the libellants gave them no notice of it, until the commencement of the present suit; that on the arrival of the brig from Russia, in February, 1834, the libellants did not take possession of her, never took any bill of sale of her, and never caused their bond to be recorded in the office of the city clerk

of Boston, and never caused any endorsement thereof upon her register.

A general replication was put in, denying all the facts in the answer; but in point of fact, as from the subsequent proceedings, it appears, the parties admit all the material facts to exist, which are stated in the original libel and answer, except that the libellants deny, that they knew that the loan was not to be applied to pay for the expenses of the vessel or her lading. The amendments principally bring forward collateral matters, asserting that the title of the claimants is not absolute, but a mere mortgage, and asking an account of the freight and other proceeds, and other matters consequent upon new allegations; to which the supplemental answer replies in a suitable manner.

Sprague for the libellants; *Fletcher* for the claimants.

Sprague said, that for what he had to offer he was indebted almost entirely to his young friend, Mr. *F. C. Loring*, whose brief had been transferred to his hands merely because that gentleman could not address the Court. *First.* Bottomry bonds may be legally made at home. The practice has existed from the earliest periods of commerce, is authorized by the ancient and modern codes of sea laws, is recognised in the laws and usages of all commercial nations at this day, in all elementary works, and is expressly authorized by the Statutes of Massachusetts. There is no distinction between bonds made by an owner or a master, except that a master's authority is limited; between bonds made for *voyages*, or *years*. It is necessary that the loan should be used for lading the ship. Bynkershoek, 506; Abbott on Shipping, 118; Ordn. of Louis XIV. lib. iii. tit. 5; Code du Commerce, art. 312; 2 Brown Civ. & Adm. L. 196; 3 Dane Abr. 114; 1 Phillips Ins. 302: Park Ins. 410; 2 Peters Adm. R. 295; *Conard* v. *Atlantic Ins. Co.* 1 Peters S. C. R. 386; *Thorndike* v. *Stone*, 11 Pick. R. 183; *Appleton* v. *Crowninshield*, 3 Mass. R. 443; S. C. 8 Mass. R. 340.

Second. If bottomry is a maritime contract, it is a corollary, that this Court has jurisdiction, especially as it alone can give relief, and effect the intention of parties, by enforcing the lien. The lender might have a remedy at common law by an action of trover or assumpsit. *Hurry* v. *Assignees Hurry*, 2 Wash. C. C. R. 145; *Bush* v. *Fearne*, 4 East R. 145; *Franklin Ins. Co.* v. *Lord*, 4 Mason R. 251. But this would be only against the person. The essence of the contract is, that the loan is made on the security of the thing; the credit is given to that, not to the borrower. The jurisdiction of Admiralty over a bond like this, has been denied in England, because the Common Law courts claim exclusive jurisdiction over them, and have power to prohibit the Admiralty courts; not because the subject-matter is not fit. All the authorities to this effect are in the Common Law Reports; in the Admiralty Reports there is no intimation of any disability or disinclination. And it is doubtful, if the Common Law courts would interfere at this time. The *Barbara*, 4 Rob. R. 1; *Corish* v. The *Murphy*, 2 Brown Civ. & Adm. Law, 530, Appendix. But it has been frequently declared, that the limited jurisdiction of the English Admiralty is no rule for this Court. *De Lovio* v. *Boit*, 2 Gall. 398; The *Jerusalem*, 191, 351; The *Smilax*, 2 Peters Adm. R. 245; The *Mary*, 1 Paine R. 671. Other cases are, however, contrary; but they were decided under circumstances, which weaken their authority, so far as the present point is concerned. See the ship *Charles Carter*, 4 Cranch R. 428; The brig *Hannah*, Bee R. 348; The *John & Alice*, 1 Wash. C. C. R. 293.

Third. The bond is forfeited, and the bottomry loan turned into a simple loan by sale of the vessel. The sale of a vessel, subject to a bottomry bond on time, is, *ipso facto*, a forfeiture of the penalty. The contract of bottomry is often compared to that of insurance. In insurance, if the risk is not commenced, the contract is dissolved; in like case, a bottomry loan becomes a simple loan. In the case of a deviation, insurers are dis-

charged, and a bottomry becomes a simple loan. If the loss be occasioned by the barratry of the master, or the misconduct of the owners, the insurance is discharged; bottomry becomes a simple loan. In both contracts, there are the same general principles; therefore, as by a sale of the vessel the insurers are discharged, so by a sale without consent, the bottomry becomes a simple loan. The general principle is the same in cases of insurance and of bottomry; that any acts of the owner, by which the risks are increased or changed, is a dissolution of the contract. The sale and delivery of this vessel to the claimants (contrary to the express stipulation and agreement of the parties to the contract), was a change of the risks, assumed by the lender, which would of itself, without any express agreement, have avoided a policy of insurance, and on the same ground would have reduced a contract of bottomry to a simple loan; and the present case is much stronger, because the lender agreed to make the loan on the express stipulation, that the vessel should not be sold, which stipulation, without their knowledge or consent, has been broken by a conveyance to third parties, acknowledging no right in these libellants, and who have compelled them to pursue their remedy at law.

Fourth. Can the rights of the lenders be defeated by a transfer of the vessel to an innocent third party? or, in other words, can the breach of an express agreement, and consequent moral obligation, by one man, have the effect to deprive another of his property? The libellants gave no credit to the borrowers; they trusted to the vessel. The claimants bought her on the faith of the warranty of the borrowers, and therefore it was they, who gave the credit to the borrower, and they must bear the consequences of their own misplaced confidence.

By every definition of a bottomry bond, it appears, that the vessel is hypothecated for payment of the loan, and that when the loan becomes due, the lender has the security of the vessel as well as of the borrower. By all authorities on the subject,

it is declared, that a bottomry lien takes precedence of all others, except a few particularly favored, such as mariners' wages. There is no authority, as well as no reason, which declares, that a bottomry lien is defeated by a transfer of the property. It is impossible to suppose, that this contract, which has been in constant practice for centuries, and on which millions have been loaned, should have ever been in use at all, if the security created by it could be defeated by a mere transfer of the vessel by the borrower. The law is laid down fully and unqualifiedly by *Parker* J. in *Appleton* v. *Crowninshield*, 8 Mass. R. 359.

I have endeavored to show, that the bond in question is a legal bottomry bond, subject to the jurisdiction of this Court, reduced to a simple loan, and made immediately due by the breach of the agreement not to deliver the vessel to any other use till the bond should be paid, and that the lien created thereby is not discharged by the transfer of the vessel.

Fletcher for the Claimants.

I. The District Court has no jurisdiction of the case, for two reasons, 1. Because the bond was executed by the owners at home. 2. Because it is not a bottomry bond.

It is not disputed in England, that the Admiralty Courts have no jurisdiction of bottomry bonds, made by an English owner in England. Abbott on Shipping, 121. In this country the law is the same. Such an opinion is expressed by *Clase* J. in *Blaine* v. *Ship Charles Carter*, 4 Cranch, R. 328; and the same doctrine has been expressly held in another case, *Forbes* v. *Brig Hannah*, Bee Ad. R. 348. See also *Story's* notes to Abbott, on p. 121 and 108. Where a bottomry bond was given by the master of a vessel and also part-owner, and having a power from the other part-owner, for a pre-existing debt, and not for necessary supplies of the vessel, it was held that it could not be enforced in a Court of Admiralty, though it might be proceeded upon in a Court of Common Law. *Henry* v. *Ship John*

and Alice, 1 Wash. C. C. R. 293. See also *Hurry* v. *Assignees of Hurry*, 2 Wash. C. C. R. 145.

The case of material men, &c. is somewhat analogous. Persons, furnishing repairs or supplies for a foreign vessel, have a lien which they can enforce by Admiralty process. But persons, repairing or furnishing supplies for a vessel in the port or State to which she belongs, have only such a lien as the State laws give them, and cannot resort to Admiralty to enforce it. See *Story's* note to Abbott, 116.

The other ground of want of jurisdiction, that this is not a bottomry bond, need not be considered separately, as all the authorities fall equally well under the next point. The case of *The Smilax*, 2 Peters Adm. R. 295, note, has been cited on the other side, to show, that the Admiralty Courts take jurisdiction of bonds made by the owner at home. But the question of jurisdiction does not appear to have been started in the case, and it was decided in the District Court by Judge *Winchester*.

II. The instrument in question is not a bottomry bond—and did not operate as an hypothecation of the brig to the Tremont Insurance Company. In taking this position, I would not be understood to say, that the instrument has no validity whatever. It is good between the parties to the instrument, as a personal obligation for the payment of the money and the marine interest, and would give the Insurance Company the same rights as another mortgage, i. e. as long as the property continued in the Flints after the year, the Insurance Company would have a right to take it as a mortgagee; but I contend, that as against *bonâ fide* purchasers, the Insurance Company stands in no better position than a common mortgagee.

The very nature of a *bottomry bond* requires, that the money loaned should be laid out upon the vessel, or for the voyage. The great privileges, belonging to the holders of such bonds upon the vessel, are given, because they have enabled the vessel to carry on the voyage; and because their money has con-

tributed to the success of the enterprise. The contracts of bottomry and respondentia have been used for several thousand years. They were used by the Greeks and the Romans, and their nature has always continued the same. It has always from the very beginning been of the essence of these contracts, that the money borrowed should be used for the purposes of building or repairing the vessel, or of the voyage. Among the Romans, the *pecunia nautica* or *trajèctitia*, was money lent to be employed in a voyage. "*Contractus nauticus, seu Trajèctitiæ pecuniæ, ille est, quo pecunia alicui creditur; hac lege, ut, si aut ipsa pecunia aut merces ex ea comparatæ navigatione perierint, periculum sit creditoris, qui nihil hoc casu recepturus erit.*" "*Trajèctitia ea pecunia est, quæ trans mare vehitur; cæterum si èodem loci consumatur, non erit trajèctitia. Sed videndum an merces ex ea pecunia comparatæ, in ea causa habeantur; et interest, utrum etiam ipsæ periculo creditoris navigent, tunc enim trajectitia pecunia fit.*" Poth. Pand. Just. L. 22. t. 2. art. 1. *Bynkershoeck* considers the Roman law *de nautico fœnore*, the origin of maritime laws on bottomry and respondentia. Quest. Jur. Priv. l. 3, c. 16. The contract *à la grosse*, as the French call it, embraces both bottomry and respondentia.

Pothier, the most accurate of all legal writers, defines it as follows. "A contract, by which one of the parties lends the other a certain sum of money, on condition, that in case of the loss of the *property on account of which* [*les effets pour lesquels*] the money has been lent, by some peril of the sea or *vis major*, the lender cannot reclaim his money," &c. Poth. *Traité du Contrat de Prêt à la Grosse.* Art. 1. n. 1. This definition is adopted by *Emerigon*, vol. 2, p. 385, and *Boucher*, 315. *Emerigon*, who has treated of this contract with greater fulness and research, than any other writer within my knowledge, demonstrates, that the money must be used for the purposes of the vessel, or the voyage, in various passages. He says, that in Italy money can be lent *à la grosse*, in the form

of a wager. "If the ship agreed on arrives, the capital and marine interest are due to the lender, and if the ship is lost, he loses both, although the borrower may not have employed the money received in the voyage, and has nothing at risk." "All this is prohibited among us. *It is of the essence of the contract à la grosse, that the money should be employed for some purpose, which exposes it to the perils of the sea;* and it is necessary, that in case of loss, the borrower had there, on his account, property to the amount of the sum borrowed." 2 Emer. 392 *Boucher*, n. 1180 adopts the foregoing emphatic words. "*If the borrower uses the money on shore, without exposing it to the risks of the sea, it ceases to be a contract à la grosse*, although it may be termed so in the instrument." Ib. 393, 396. "Money procures articles, which we wish to send or carry beyond sea; and without money a ship cannot get out of port. This is the reason, why so great privileges are given to the contract *à la grosse*. But as soon as a ship has set sail, the public interest is accomplished, and it is no longer necessary to grant such privileges to an enterprise already executed. Our ordinance, which permits insurance before or during the voyage, does not repeat the same provisions in regard to this contract. So far from it, the privilege given by the article 7 h. t. is not given on the hull, except to those, who have advanced their money for the necessities of the voyage; and is given on the cargo only to those who have furnished their money to make it (*pour le faire*)." 2 Em. 484. Hall's Maritime Loans, 136. *Emerigon* next controverts the opinion of *Valin*, who says it is of little importance whether the lending be before or after the departure of the vessel, on the ground, that the presumption is, that money has been beneficially employed for the thing put at risk, or has paid what was due on this account. "But this presumption," he says, "would go too far, for here the interest of third parties comes in question; and privileges are to be construed very strictly. I think, therefore, that a third party would

have sufficient ground for resisting the pretended preference of the lender, whose contract was entered into after the risk commenced." 2 Em. 484. After citing a case on the subject, he proceeds: "After the sailing of the ship, nothing prevents the borrowing of money, and assigning in payment the interest at risk; but this assignment does not give the creditor any right in the thing, *(droit real)* or privilege on the thing. The money is not truly *trajectitia*, unless the property at risk has been acquired by means of the money borrowed. *Trajèctitia ea pecunia est quæ trans mare vehitur. Sed videndum an merces ex ea pecunia comparatæ, in ea causa habeantur; et interest, utrum etiam ipsæ periculo creditoris navigent, tunc enim trajèctitia pecunia fit.* L. 1 ff. *de naut fœn.* Now the borrowing, after the sailing of the vessel, has not procured the cargo already at risk, *merces ex ea pecunia comparatæ non fuerunt.* The money is not *trajèctitious.* The presumption of which M. *Valin* speaks is contrary to the text of the law; it would give rise to the greatest abuses." 2 Emer. 484, 5. *Bynkershoek* gives a case of a contract called a bottomry, by which the owners and master of a vessel conveyed her to two merchants, to secure them for a loan. They afterwards sold the vessel; and the purchaser held her by the decree of the Court of Holland, free from the claim of the two merchants. One of the reasons, in support of the decision, whether his own or the Court's does not appear, was that the money was not borrowed *in necessitate itineris*, Quest. Jur. Priv. L. 3, c. 16. The principles of the English law are the same as the French and the Roman, and have always been recognised as such. "Bottomry," says *Blackstone*, "(which originally arose upon permitting the master of a ship, in a foreign country, to hypothecate the ship in order to raise money to refit) is in the nature of a mortgage of a ship; when the owner takes up money *to enable him to carry on his voyage*, and pledges the keel or bottom of the ship *(partem pro toto)*, as a security for the repayment." 2 Black. Com. 457. "Bot-

tomry is a contract in the nature of a mortgage of a ship, on which the owner borrows money *to enable him to fit out the ship or to purchase* a cargo for the voyage proposed, and he pledges," &c. 2 Marsh. Ins. 733. *Park*, 410, and *Hughes*, 451, give similar definitions. So *Holt*, vol. 1, p. 419. *Marshall*, in comparing bottomry and insurance, says, "In bottomry the lender furnishes the borrower with the money to purchase the goods which are put at risk." Ib. 737, 738.

Lord *Tenterden*, also, in his Treatise on Shipping, p. 118, evidently has the same idea, that when the owners borrow money it must be to raise money for the purposes of the voyage. The form of a bottomry bill in *Beawes*, 144, given by the owner and master, recites that he is necessitated to take up money, upon the adventure of the ship, for setting forth the said ship to sea, and furnishing her with provisions. So in the forms of bottomry and respondentia bonds, given by *Magens*, vol. 2, p. 431 and 433, the object of the loan is recited.

The cases on the subject of bottomry and respondentia, in England and this country, are not numerous. Much the greater part of them, are cases, where money had been advanced to captains in foreign ports, and they bottomried the ships as security. All the cases in the English Admiralty reports, I believe, are of this kind. Lord *Stowell* remarks, that these bonds "are usually given, for the payment of repairs and other necessary expenses incurred in foreign parts, where the owner and captain have no personal credit." The *Zodiac*, 1 Haggard 325. I am not aware of any case, English or American, in which a bottomry bond has been supported, where it was given by the owner, for a debt not connected with his vessel or her navigation. It seems every where taken for granted, that money lent on bottomry must be used for the vessel or the voyage.

Thus, in the case of Sloop *Mary*, 1 Paine, 674, *Thompson* J. says, in speaking of the difference between the power of the master and the owner, that the owner "has the absolute control

over his property, and has a right to pledge his vessel for money borrowed for any purpose, to be applied to repairs, outfits, or other necessaries, or to the purchase of a cargo." Here, it is evidently taken for granted, that these were the only purposes, for which an owner could bottomry his vessel.

The foundation of the contract of bottomry is, that the lender has contributed to build, purchase, or preserve the subject on which he claims a lien, which could not have been done without his aid. It is for this reason, that he has peculiar privileges. He has been the benefactor of the property. No reason of this kind applies to the instrument now in question. The ship was at sea on a voyage home, and the libellants cannot in any manner have contributed to preserve the ship, or enable her to prosecute her voyage. They are common lenders of money, and have taken a mortgage of the ship, to secure their loan. The circumstance of their also insuring the ship by the same instrument, does not, according to well-settled principles, alone make it a bottomry bond. They are mere mortgagees, and whether they have any lien against the respondents, must depend upon the principles of mortgages, not of bottomry bonds. Now, they have never recorded their mortgage, under the statute of Massachusetts, (1832, ch. 157 s. 1). It is therefore void. If, however, the Court should be of opinion, that the instrument ought to be called a bottomry bond, and so comes within the exception of the statute, still I contend, that it is a bottomry of a peculiar kind, not entitled to any peculiar privileges, and that the libellants could have no lien without proving a delivery. All the objections to secret liens on property, apply to this instrument—while none of the reasons in favor of bottomries, on account of advances for the vessel or voyage, plead in its behalf.

Lord *Tenterden* says, that where owners in England pledge their vessels by bottomry, the holders of the bond cannot resort to Admiralty, and then proceeds—"If the contract relate to a British ship, and purport to be, either a present assignment of

the ship, liable to be defeated on repayment of the money due at the end of the voyage, or a future assignment, to take effect only upon failure of such payment, it seems, that a compliance with the provisions of the register acts, in regard to the transfer of property in ships, is essential to the validity of the contract." Abbott on Shipping, 121. The case of *Conard* v. *Atlantic Ins. Co.*, 1 Pet. S. C. R. 386, has been cited on the other side, to show, that the circumstances of a respondentia loan being made, while the vessel was at sea, and for purposes not connected with the voyage, did not prevent the lender, from having a lien on the property, and holding it against another creditor, viz. the United States, who had levied on the goods, before they came into the possession of the lenders of the money. The authority of this case is not questioned. But the case does not decide, that the respondentia bond gave any lien on the goods. It was the endorsement of the bills of lading to the lenders of the money, which was considered as giving them a title to the goods. No doubt the respondentia bond was valid to secure the loan and maritime interest; but there is nothing in the case, which would lead to the conclusion, that it would itself have given a title, to the goods against *bonâ fide* purchasers or attaching creditors.

In the present case, the validity of the bond is admitted, as far as it is a personal obligation for the payment of money; but it is denied, that it gave any lien on the ship against a *bonâ fide* purchaser. To make the case parallel with *Conard* v. *Atlantic Ins. Co.*, the Tremont Insurance Company should have had a bill of sale of the vessel, and a new register, in which case their title to the ship would not have been disputed.

In the arguments, in the case of *Conard* v. *Atlantic Ins. Co.*, most of the authorities on both sides will be found. The great length of time, for which the loan in this case was made, is a strong objection to the bond. It was subjecting the vessel to a secret lien for a great length of time. Though bottomry loans may be made on time, as well as for a voyage, the argument of inconvenience is very strong in this case.

There was no right of action, when this libel was filed. The bond was not due till January 6, 1835. The libel was filed, Oct. 1834. There had then been no breach of the agreement.

STORY J. This is the case of a libel against the brig Draco, upon an asserted bottomry bond. The claimants, Messrs. Stanton, Nichols & Whitney, assert in themselves a title as vendees, and other matters of defence, upon which I shall presently have occasion to comment. In the progress of the cause the vessel was delivered on bail to the claimants upon the usual stipulation; and certain amendments and additions have been made in the libel and answer, with which matters it is unnecessary to intermeddle, until other more important and grave matters are disposed of, which are preliminary in their nature. The cause has been exceedingly well argued on both sides; and I shall now proceed to pronounce the opinion of the Court.

The asserted bottomry bond is certainly, in its form and actual structure, new in this court; and it has stipulations, which are not to be found in any of those, which have been matter of controversy (at least as far as I have knowledge) in any of the English or American courts. I am, indeed, informed at the bar, that it is of very recent origin, although not at present uncommon in the commercial transactions of the metropolis of this State. On this account, and also, because it constitutes the basis, on which much of the argument at the hearing rests, I shall recite its contents in the very terms of the instrument. [Here the Judge recited it *verbatim*.]

The case, then, presented for the consideration of the Court is that of an asserted bottomry bond in the form above-mentioned, made by citizens of the State of Massachusetts, in the home port of the vessel, in favor of a corporation created under the authority of a charter from the government of the same State. It bears date (as we have seen) in January, 1834, and the present suit was brought in October of the same year, before the period

stipulated for the termination of the risk, according to the terms of the instrument, had expired.

The first question arising in the case is that of the jurisdiction of the District Court, sitting in Admiralty, over the instrument as a fit foundation for a proceeding *in rem*. It is not doubted, that the jurisdiction exists as to all bottomry bonds executed abroad, either by the master or owner, where such bond is given to obtain supplies for the ordinary exigencies of the ship and the voyage, to enable her to complete it; as for repairs and outfits, and the discharge of the debts and charges on the ship or adventure. But it is denied, that the present is a bottomry bond, or maritime hypothecation, in the sense of the general maritime law, upon which admiralty process lies; and in support of this objection various grounds have been relied on, which I shall presently consider.

And, in the first place, it is objected, that the bond was executed by the owners in the home port; and upon such an instrument no Admiralty process lies, even supposing it to be in all other respects a bottomry bond or maritime hypothecation. In regard to bottomry bonds executed abroad by the owners in person, instead of the master, no objection has been suggested in the present argument; and I confess myself wholly unable to comprehend, how any objection could, in point of law, be reasoned out to overthrow their validity. Lord *Stowell* has expressly affirmed it.[1] Mr. Justice *Thompson*, in an elaborate opinion, has maintained the jurisdiction upon grounds, which seem to me entirely satisfactory and conclusive.[2] And it is perfectly clear, that securities of that sort, made at the home port, are valid and obligatory, as bottomry claims, in the State of Massachusetts; for the Legislature have, in the general act defining the duties, powers, and restrictions of incorporated insurance com-

[1] The *Barbara*, 4 Rob. R. 1, 2.

[2] The Sloop *Mary*, 1 Paine Cir. R. 671.

panies (act of 1817, ch. 120), expressly authorized such companies "to loan to any citizen of this State any portion of their capital stock, not exceeding one half, on respondentia or bottomry." The bottomry bonds here alluded to plainly include loans in the home port to citizens upon the common maritime risks.

And this is, as I conceive, entirely conformable to the established doctrine in all maritime countries (at least as far as my researches extend), ancient and modern. By the Roman law, owners, as well as the master, could clearly hypothecate for a maritime loan, as we shall abundantly see hereafter; and in no modern commercial nation has the power been denied to the owner, where it could be exercised by the master. But, on the contrary, it could be exercised by the owner in cases, where the master could not exercise it. This is certainly true in relation to Scotland, France, Holland, and Italy, and all the other principal commercial nations of continental Europe.[1] And in England the principal writers, who give a description of bottomry, mention it as a contract of the owner, without any reference at all to the master. We shall see, that so is the description of Mr. Justice *Blackstone* in his Commentaries (2 Black. Comm. 457), which will be hereafter cited. Mr. *Marshall* follows almost the very words of *Blackstone* saying, "Bottomry is a contract in the nature of a mortgage, on which the *owner* borrows money to enable him to fit out a ship, or to purchase a cargo for a voyage proposed; and he pledges the keel or bottom of the ship *(pars pro toto)*, as a security for

[1] See 2 Emerig. Traitè a la Grosse, ch. s. 1, s. 2, s. 3. 2 Valin Comm. lib. 3, tit. 5, art. 1, 2. 7. Pothier Traité a la Grosse, n. 1, 7, 9. Bynk. Quest. Priv. Juris. b. 3. ch. 16. Jacobsen's Sea Laws, ch. 1, p. 8, 9, 10. Code de Commerce de France, art. 321, 322. 2 Bell Comm. b. iii. part 1. ch. 5, s. 1, art. 459, 460. Dig. lib. 22, tit. 2. Code lib. 4, tit. 33.

the repayment;" and Mr. *Park* uses similar language.[1] Lord *Stowell*, in his elaborate judgment in the *Atlas* (2 Hagg. Adm. R. 53), copies the very language, of Mr. *Marshall*, as the common and true definition of the contract of bottomry. Lord *Tenterden*, in his Treatise on Shipping (Abbott on Shipp. P. 2, ch. 3, s. 17, s. 21), treats expressly of bottomry contracts made by the owners, as well as by the master, and without the slightest distinction, as to their being equally entitled to that character. So that, either upon the principles of the general maritime law, or of the local law, there can be no reasonable doubt, that a bottomry contract, made by the owner in the home port, is, in a just and accurate sense, entitled to that distinctive appellation.

Whether upon contracts so made in the home port, a remedy lies in the Admiralty *in rem* is quite a different question. Lord *Tenterden*, in his excellent Treatise on Shipping (P. 2, ch. 3, s. 21), seems to have thought, that no such remedy does lie, founding himself entirely upon a dictum of Lord *Holt* in *Johnson* v. *Shippen* (2 Ld. Raym. R. 983), and a dictum of Mr. Justice *Lawrence* in *Busk* v. *Fearon* (4 East R. 319), not however reported in the case. The dictum in each of these cases was purely extra-judicial; and the latter was probably founded entirely upon the former, which was given at a period, when the contest for jurisdiction between the Courts of Common Law and the Court of Admiralty was maintained with great zeal and pertinacity on each side, *flagrante bello*. If I might venture, therefore, to make the remark, *pace tanti viri*, I should say, that an *obiter dictum*, under such circumstances, even of so great a mind, is entitled to very little weight. Indeed, the

[1] 2 Marsh. Insur. b. 2, ch. 1, p. 733. Id. ch. 2, p. 740. Hughes on Insur. ch. 17, p. 451, 452. 2 Bro. Civ. and Adm. L. 196, 197. Park on Insur. 6th edit. 1809, ch. 21, p. 552. See also Lord *Stowell's* opinion in The *Zodiac*, 1 Hagg. R. 326.

dictum seems, when correctly examined, to import no more, than that the law will not, under such circumstances, imply an hypothecation, since the owner may give a positive security. And this distinction is most important; for in the case of *Justin* v. *Ballam* (2 Ld. Raym. R. 805), it was held, that for the repairs of a foreign ship in England no *implied* hypothecation exists (a doctrine, which has been overthrown by the Supreme Court of the United States[1]); but if an actual hypothecation or positive security on the ship was given there (it seemed admitted), a remedy to enforce it would lie in the Admiralty. So it was expressly held by the same Court in *Benzen* v. *Jeffries* (1 Ld. Raym. R. 152). Now, in the case at bar, there is, by the very terms of the instrument, an express and positive hypothecation, by way of mortgage and assignment of the brig, for the security of the loan and interest. And I do not perceive, how any sound distinction can be taken between an express hypothecation by a master or by an owner in such a case, since the same objection applies to each, that it is executed within the realm and on land, and therefore not within the Admiralty jurisdiction as a maritime hypothecation.

The observations of the Supreme Court of the United States, in the case of *Blaine* v. *The ship Charles Carter* (4 Cranch R. 332), merely apply to the case of an implied hypothecation, where the loan is made in the home port. "In the case of a bottomry bond, executed by an owner in his own place of residence (say the Court), the same reason does not exist for giving an implied Admiralty claim upon the bottom [of the ship]; for it is in his power to execute an express transfer or mortgage."

[1] The *Aurora*, 1 Wheaton R. 96, 106. The *General Smith*, 4 Wheaton R. 438. *Peyroux* v. *Howard*, 7 Peters R. 341. The case of *Turnbull* v. The *Enterprise*, Hopk. R. 100. S. C. Bee Adm. R. 345. *Clinton* v. The *Hannah*, Hopk. R. 99. S. C. Bee Adm. R. 419; and *Shrewsbury* v. The *Two Friends*, Bee Adm. R. 433, were all on *implied* hypothecations brought by material men for services, &c. in the home port.

But not the slightest doubt was expressed, that, if the bond was truly a bottomry bond, and an express hypothecation or mortgage was included in its terms, there would be a remedy *in rem* in the Admiralty to enforce it. On the contrary, the doctrine repeatedly held by the Supreme Court of the United States, in later cases, has been, that where the contract is clearly of a maritime nature, and the local law gives a lien on the ship as a security, (and *a fortiori*, the rule applies, where there is a positive hypothecation or security given by the party[1]) there the Admiralty has jurisdiction *in rem* to enforce it. Such was the doctrine held in the case of the *General Smith* (4 Wheat. R. 443); and it has been fully recognised in the late case of *Peyroux* v. *Howard* (7 Peters R. 341). The ground of the doctrine is, that the Admiralty has a general jurisdiction over maritime contracts connected with navigation and foreign trade; but it cannot enforce them by a proceeding *in rem*, unless the local law attaches a lien on the thing as a security.

The case of *Wilmer* v. *The Smilax* (2 Peters R. 295, note), is directly in point as to the jurisdiction. It was a case of an *express* hypothecation of the ship on bottomry; and Judge *Winchester*, a most learned and pains-taking judge, than whom few have studied the Admiralty jurisdiction with more care, or administered it with more ability, did not hesitate to sustain the jurisdiction, although the money was loaned to the owner in the home port. The case of *Corish* v. *The Murphy* (2 Bro. Cir. & Adm. Law, 530, Appendix), was a case of a bottomry bond in the home port; and after a very able argument, the jurisdiction was sustained. Mr. Justice *Thompson*, in the case already alluded to,[2] has placed the subject in a very clear and strong light. After having stated, that he saw no distinction as

[1] See *Benzen* v. *Jeffries*, 1 Lord Raym. R. 152. *Justin* v. *Ballam*, 2 Lord Raym. R. 805. *Johnson* v. *Shippen*, 2 Lord Raym. R. 983.

[2] The sloop *Mary*, 1 Paine Cir. R. 671.

to the Admiralty jurisdiction, whether the bond was made by the owner or the master, he said that the delegation of admiralty and maritime jurisdiction by the constitution of the United States was broad enough to embrace all maritime contracts, and that all civilians and jurists agree, that marine hypotheçations fall under this denomination. He then added: "And why should there, upon principle, be any difference as to the jurisdiction of the court, whether the bottomry bond is given by the owner or by the master? If the jurisdiction depends upon the subject-matter of the contract, this is the same, whether the pledge is given by the one or the other. The object and effect of the bond are the same in both cases, creating a lien upon the vessel." The case of the *Barbara* (4 Rob. R. 1), goes far to sustain the same doctrine; and it was there stated by counsel, that the cases respecting domestic bonds, in which a prohibition had been granted, had been chiefly concerning bonds given by the master *solely* as master. The case of *Henry* v. *The ship John & Alice* (1 Wash. Cir. R. 293), is, I am aware, the other way. But it was made at a period, when the Admiralty jurisdiction was not as well understood and defined, as it has since been by the Supreme Court of the United States, and when the learned Judge, who decided it, had very little experience in maritime causes. That case cannot stand, unless upon the ground, that a bottomry bond given by an owner, in a foreign port, is not cognizable in the Admiralty; a doctrine, which is inconsistent with what I cannot but now think to be an established doctrine in our Admiralty Courts. In *Menetone* v. *Gibbons* (3 T. R. 269), Mr. Justice *Buller* said, that the form of the bottomry bond does not vary the jurisdiction. The question, whether the Admiralty has or has not jurisdiction, depends on the subject-matter. And Lord *Kenyon*, on the same ground added, that it would be highly inconvenient, if the Admiralty had not jurisdiction in such cases, because that Court proceeds *in rem*, whereas the courts of common law can proceed only against

the parties. I do not cite this language as being founded on a case, like the present, (for it was the case of a bottomry bond made by the master in a foreign port); but to show the true ground of the Admiralty jurisdiction, it being a maritime jurisdiction, and the true nature of it, a proceeding *in rem*. My own opinion has been long unequivocally expressed, that the Admiralty has a rightful jurisdiction over all maritime contracts *in personam*; but that in cases of that sort it cannot proceed *in rem*, unless there be a maritime lien, or a positive pledge as security. And, therefore, I have no difficulty in overruling the objection, that the Admiralty jurisdiction does not extend to bottomry bonds, given by the owner in the home port, where there is an express pledge as security.

Another objection is, that the bond in this case cannot be deemed to be, in the sense of the maritime law, a bottomry bond. In the first place, it is said, that the very nature of a bottomry bond requires, that the money loaned should be for the necessities or use of the ship for the voyage, as for instance, to purchase a cargo, to repair the ship, or to obtain outfits. The expenditure must be for or on the property; or, to use the expressive language of the counsel for the claimants, the bottomry lender must be a benefactor of the property. If, therefore, the money be lent, while the vessel is at sea, for other purposes, and not to be employed on the vessel, or for the voyage, although it may be (if the words of the instrument are sufficient for this purpose) a valid mortgage, it is not a maritime hypothecation.

There is no doubt, that the language used in books of authority countenances this objection, though it is by no means certain, that the authors had in view any such qualification, as it professes to define and enunciate. Their language is rather intended to be descriptive of the most common forms and occasions of the instrument, than to express the true nature and definition of it. Thus, Mr. Justice *Blackstone*, in his Commentaries (2 Black. Comm. 457), says; "Bottomry (which originally arose, from

permitting the master of a ship, in a foreign country, to hypothecate the ship, in order to raise money to refit), is in the nature of a mortgage of a ship, when the owner takes up money to enable him to carry on his voyage, and pledges the keel or bottom of the ship (*partem pro toto*) as a security for the repayment. In which case it is understood, that if the ship be lost, the lender loses also his whole money; but if it returns in safety, then he shall receive back his principal, and also the premium or interest agreed upon, since it may exceed the legal rate of interest. And this is allowed to be a valid contract in all trading nations, for the benefits of commerce, and by reason of the extraordinary hazard run by the lender. And, in this case, the ship and tackle, if brought home, are answerable, as well as the person of the borrower, for the money lent, &c." And after speaking of respondentia bonds, he adds; "These terms are also applied to contracts for the repayment of money, borrowed not on the ship and goods only, but on the mere hazard of the voyage itself; when a man lends a merchant £1000, to be employed in a beneficial trade, with condition to be repaid with extraordinary interest, in case such a voyage be safely performed; which kind of agreement is sometimes called *Fœnus nauticum*, and sometimes *Usura maritima*." And here it may be remarked, that the learned author makes not the slightest scruple in holding a bottomry bond by the owner to be binding on the ship, as a maritime hypothecation. But, taking the whole language together, it is manifest, that he did not contemplate, that the money must necessarily be laid out for or in the ship, to constitute a genuine bottomry contract.

This sort of contract was well known to the ancients, and in the Roman Law, it was called *Trajèctitia pecunia*, or *Fœnus nauticum*. The civil law gave this description of it; "*Trajèctitia pecunia est, quæ trans mare vehitur; cæterum, si eodem loci consumatur, non erit trajèctitia. Sed videndum, an merces ex ea pecunia comparatæ, in ea causa habeantur? Et interest,*

utrum etiam ipsæ periculo creditoris navigent: tunc enim trajèctitia pecunia fit."[1] But cases are put in the Pandects, which plainly show, that there are other cases, which fall within the same denomination, where the loan is not employed in the purchase of the identical goods; but the risk only is taken on them. Thus, the case is put of money lent on a pledge of goods in different ships, some of which have been already pledged to other lenders. "*Fœnerator, pecuniam usuris maritimis dando quasdam merces in nave pignori accepit; ex quibus si non potuisset totum debitum exsolvi, aliarum mercium aliis navibus impositarum,* propriisque fœneratoribus obligatarum, *si quid superfuisset, pignori accepit; Quæsitum est, nave propriâ peremptâ, ex qua totum solvi potuit, an id damnum ad creditorem pertineat, intra præstitutos dies amissâ nave? An ad cæterarum navium superfluum admitti possit? Respondi. Alias, quidem pignoris diminutio, ad damnum debitoris, non etiam ad creditoris, pertinet. Sed cum trajèctitia pecunia ita datur,* ut non alias petitio ejus creditori competat, quam si salva navis intra statuta tempora pervenerit, *ipsius crediti obligatio, non existente conditione, defecisse videtur.*"[2] An answer, that presupposes, that the money may be lent, not only upon goods purchased with it, but upon the ship itself on the risk of the voyage. The succeeding law demonstrates this still more fully, and shows, that a bottomry bond might exist, although the loan was merely on the risk of the ship for the voyage. "*In quibusdam contractibus etiam usuræ debentur, quemadmodum per stipulationem. Nam, si dedero decem trajèctitia ut, salvâ nave, sortem cum certis usuris recipiam, dicendum est, posse me sortem cum usuris recipere.*" The *Trajèctitia pecunia* of the Roman Law, was not so entirely confined to money lent for the ship, or for goods to be put on board the ship, as we might at first view suppose; though, doubtless, in the simplicity of the commerce of those times, this was

[1] Dig. Lib. 22, tit. 2, l. 1.

[2] Dig. Lib. 22, tit. 2, l. 6.

the most common object of the transaction. The Code (Lib. 4, tit. 33, l. 3), puts a case, illustrating the principle, of which it is only necessary to state the introductory part, "*Cum proponas te nauticum fœnus ea conditione dedisse, ut post navigium, quod in Africam dirigi debitor adseverabat, in Salonitanorum portum nave delata, fœnebris pecunia tibi redderetur, ita ut navigii duntaxat, quod in Africam destinabatur, periculum susciperes,*" &c.

Emerigon, when rightly understood, confirms this opinion. That, which we call money lent upon maritime loan (*a la grosse*), says he, was called by the Romans *Pecunia Trajèctitia*; not that it was merely lent to the borrower of it, to be transported to another place, but because it was lent to the borrower to employ it in his maritime commerce upon the obligation of returning it in case of a successful voyage with the stipulated nautical interest, and upon the condition, that, if the ship was lost by a peril of the sea, in the course of the voyage, the borrower should not be obliged to return either principal or interest.[1] Emerigon adds, that it is called in France, *a la grosse aventure*, because the lender exposes his money to the accidents of the sea; and he contributes to gross or general averages.

The definition of Pothier, which is adopted by Emerigon, is quite as comprehensive. The contract of maritime loan (*a la grosse aventure*), says he, is a contract, by which the lender lends to the borrower a certain sum of money upon condition, that in case the loss of the effects, on account of which it is lent, taking place by any peril of the sea, or superior force (*vis major*), the lender shall not be repaid, unless to the amount of what shall remain.[2]

If we pursue the definitions of these authors into the analysis, which follows, we shall perceive, that they no where intend to

[1] Emerigon Traitè des Contrats a la Grosse. Ch. 2 tom. p. 384, [406] (*b*) Id. § 2, n. 2.

[2] Pothier Traitè du Pret a la Grosse aventure. Art. 1, n. 1.

insinuate, that it is indispensable, even under the French law, which is narrower than the law of some other countries on this subject, as for instance, Italy and England, that the money should be lent for the purposes of the ship or the voyage.[1] Thus, Pothier says; Five things compose the essence of the contract: (1.) That money should be lent; (2.) That there should be one or more things, upon which the loan should be made, (to contradistinguish it from a mere wager on the voyage, which the French law inhibits); (3.) That there should be risks, to which the things are exposed, to be borne by the lender; (4.) A stipulated payment should be made by the borrower for the loan, in case of a successful arrival, as a price for the risks run, which is called maritime profit; (5.) And there should be the agreement of the parties upon all these things. Now, taking this to be a complete specification of the essentials of a bottomry bond, the present possesses them all in a direct and unequivocal form; and not one of them points to the necessity of the money being laid out for or upon the voyages; but only, that the property, subject to the lien, should be at risk on the voyage.[2] Emerigon, indeed, in some places, uses language, which seems to import other distinct qualifications; as that the money should be lent for the necessities of the ship or for the voyage. But, taking its general scope, it does not seem to me to vary intentionally from the definition of Pothier; but to have a special reference to certain texts of the Roman law, or to the express provisions of the French Ordinance. Valin defines the contract thus: A maritime loan is a contract, by which the lender, in consideration of the sum, which he will lose, if the thing, upon which he has made the loan, should perish by inevitable casualty, is authorized to stipulate for an interest or extraordinary profit, in case the thing arrives at the proper port.[3]

[1] See Emerigon Traitè a la Grosse, ch. 1, s. 3.

[2] Pothier Traitè a la Grosse, art. 2, n. 7.

[3] 2 Valin Comm. tit. 5, p. I.

And, notwithstanding the positive provision of the French Ordinance, giving the privilege of maritime hypothecation for money lent on the hull and keel of the vessel for the necessities of the ship, and, the charges for the payment of the lading for the voyage, which seem to imply, that the privilege is confined to such cases, Valin insists, that it is of no consequence, whether the loan is made before or after the sailing of the vessel on the voyage, since the presumption is, that it has been usefully employed for the thing at hazard, or has been applied to debts contracted on the same account.[1] From this doctrine, however, Emerigon dissents;[2] not upon any ground of general principle, but upon the construction of the terms of the Ordinance. Mr. *Marshall*, in his work on Insurance, gives the preference to Valin's opinion; and manifestly supposes, that the English law agrees with it.[3]

I have the rather brought into review the opinions of these eminent maritime jurists, because they were greatly relied on at the argument, as establishing the principle, that a genuine bottomry bond is confined to money lent for the necessities of the ship, or cargo, or voyage. I agree, that this seems to be the fair result of the French Ordinance, but it stands positively on the text. I agree also, that this is uniformly the case, where the master takes up money on maritime loan; but this also turns upon the nature and qualifications, and limitations of his powers, as master. But I cannot admit, upon general principles belonging to the contract as a maritime loan, that there is any such limitation or qualification applicable to the case of the owners becoming borrowers.

The truth is, that contracts of bottomry are not contracts importing, in all countries, precisely the same obligation and ex-

[1] 1 Valin Comm. b. i. tit. 14, s. 16, pp. 364, 366.

[2] 2 Emerigon, Traitè a la Grosse, ch, 5, s. 3.

[3] 2 Marshall Ins. b. ii. ch. 3, p. 749. Id. 742. Id. ch. 4, pp. 749, 750.

tent. And though in all commercial countries they are in use; yet the forms and operation of them are not precisely the same in different countries, but are controlled by the local laws.[1] We may apply to them the same remark, which Lord *Ellenborough* applied to a respondentia bond, that "it is a contract, not of a universal nature and form, but depending upon the particular form of the instrument, varying in different countries;" and, it may be added, variously modified by the municipal laws. And in the definition usually given of it by authors, they confine themselves (as has been already hinted) rather to a description of the most common forms and occasions, in which it appears, than to a strictly juridical definition. Yet it is remarkable, that *Blackstone* and *Marshall*, and Lord *Stowell*, in propounding a definition, speak (as we have already seen) of bottomry contracts of the *owner* only, omitting those of the *master*, which are now far more common, and strictly for the necessities of the ship.

In my opinion, there is not the slightest ground to uphold the doctrine, that, in order to constitute a bottomry bond, as such, in the sense of the maritime law, it is necessary, that the money should be advanced for the necessities of the ship, or for the cargo, or for the voyage. Where it is given by the master, *virtute officii*, it must, in order to have validity, be for the ship's necessities; for the implied authority of the master extends no farther. But where it is given by the owner, as *dominus navis*, he may employ the money, as he pleases. It is sufficient, if the money be lent upon the bottom of the ship, at the risk of the lender, for the voyage. The true definition of a bottomry bond, in the sense of the general maritime law, and independent of the peculiar regulations of the positive codes of different commercial nations, is, that it is a contract for a loan of money on the bottom of the ship, at an extraordinary interest, upon maritime risks, to

[1] See The *Nelson*, 1 Hagg. Adm. R. 176. The *Zodiac*, 1 Hagg. Adm. R. 325.

be borne by the lender for a voyage, or for a definite period.[1] This is the true exposition given of it by *Binkershoek*, in his usual strong and masculine manner. After having remarked upon the insufficiency of the definition of Grotius, and that the contract itself had been extended since by little and little, and other and other things (*paulatim ad alia atque alia porrectus est*) since the days of Grotius, he says, *Grotii definitio nec legibus nec formulis satis congrua, et multis nominibus imperfecta est.* He gives his own definition in the following words; *Ut autem nunc obtinet Bodemery, definio, contractum, quo pecunia creditur magistris navium in exteris regionibus, sive Dominis navium et mercium in his regionibus, ea lege, ut, si navis pereat, creditor jus crediti amittat; si salva advenerit in locum destinatum, sors restituatur cum usuris nauticis, vel majoribus vel minoribus, ut pro ratione periculi inter creditorem et debitorem convenit.*[2] This comprehensive definition embraces precisely the same ingredients, and no more, as the essence of the contract, as are enumerated by Pothier in the passages already cited.

This is precisely the view taken of it by Lord *Tenderden*, in one of the most recent cases, which has occurred on the subject. He considers it to be the very essence of a bottomry bond, as contradistinguished from any other bond, that it is for money taken up on maritime risks, at the hazard of the lender.[3]

Mr. *Bell*, in his valuable Commentaries upon the Commercial Law of Scotland (2 Bell Comm. 83, ch. 5, s. 1, art. 460), has given a definition substantially the same, which, he says, contains the essence of the contract, as defined by all the great writers upon maritime law. He says, that, "by the contract of bottomry or respondentia, money is, in contemplation of a particu-

[1] See also 2 Marsh. on Insurance, b. ii. ch. 3, p. 742; ch. 4, p. 748, 749, 750. See Lord *Stowell's* opinion in The *Atlas*, 2 Hagg. Adm. R. 48, 52,53, 55, 57, 58.

[2] Bynk. Quæst. Juris Priv. lib. iii. ch. 16.

[3] *Simonds* v. *Hodgson*, 3 B. & Adolph. 50, 56.

lar voyage, lent to the master of a ship in a foreign country, or to the owner of the ship or cargo in a home port; on this condition, that if the subject, *on which the money is taken*, is lost by sea risk or superior force, the lender shall lose his money; and that if the voyage shall be successful, the sum shall be repaid, with a certain profit or consideration for interest and risk, as agreed upon."

And this is clearly the view taken of the contract by the Supreme Court of the United States, in the case of *Conard* v. *The Atlantic Insurance Company* (1 Peters R. 436, 437), where the very objections were taken, which have been taken in this case. That, indeed, was the case of a respondentia bond. But upon this point, none of the authorities cited in support of the objections make any distinction between bottomry bonds and respondentia bonds; but they profess to hold both to be governed by the same rules. The objections were, first, that the loans were made after the sailing of the ships on the voyage; secondly, that the money loaned was not appropriated to the purchase of the goods put on board, and was not the identical property, on which the risk was run. What was the language of the Supreme Court, in reply to these objections? "In our opinion, neither of these objections can be sustained. It is not necessary, that a respondentia bond should be made before the departure of the ship on the voyage, nor that the money loaned should be employed in the outfit of the vessel, or invested in the goods, on which the risk is run. It matters not at what time the loan is made, nor upon what goods the risk is taken. If the risk of the voyage be substantially and really taken; if the transaction be not a device to cover usury, gaming, or fraud; if the advance be in good faith for a maritime premium; it is no objection to it, that it was made after the voyage was commenced, nor that the money was appropriated to purposes wholly unconnected with the voyage." Now, the doctrine here stated, which was the unanimous opinion of the Court, is, in my judgment, perfectly

conclusive upon the point stated. And I am entirely satisfied, upon a review of the principles upon which it is founded, that it cannot be shaken but by overthrowing principles deeply settled and fixed in the maritime law. I find too, that my learned friend, Mr. Chancellor *Kent*, adopts this view of the subject, as the true and satisfactory doctrine on the subject.[1]

It is also objected, that if the bond is a good bottomry bond, still it is one of a peculiar nature, and does not give any maritime privilege or lien on the vessel; but it is to be treated as a case of a mortgage at the common law. If treated as a mortgage, it is said to be void as against the Registration Act of Massachusetts, respecting personal property; and if not, still there would be no lien without a delivery of possession, which has not been done. In regard to the terms of the bottomry bond, it is certainly true, that they are of a peculiar nature; but still their import is undeniably, that the loan is upon maritime risks, the ordinary risks in policies of insurance, and the property was at the time of the loan in the borrowers. There are, therefore, all the proper ingredients of a bottomry bond. And as to collateral matters, not displacing these, there can be no doubt, that they constitute grounds of contract, which the parties may modify according to their own pleasure. With respect to the privilege or lien, it is not a case depending upon the effect of any implied hypothecation under the maritime law; for there is an express mortgage and assignment, which is a positive hypothecation; and it being as clear, that it is for maritime risks, it follows of course, that it is a maritime hypothecation, which, in legal contemplation, is neither more or less than a maritime mortgage.

The other point, as to the necessity of registration, depends merely upon the statute of Massachusetts of 1832, ch. 157, which provides for the registration of mortgages of personal property. That statute contains the following exception and

[1] 3 Kent Comm. Lect. 49, p. 361, 362, (2d edition).

proviso: "Provided, that nothing herein contained shall affect any transfer of property under bottomry or respondentia bonds, or of any ships or goods at sea, or abroad, if the mortgagee shall take possession thereof, as soon as may be, after the arrival of the same in this Commonwealth." As I understand this section, it expressly excepts from the operation of the Statute, all transfers under bottomry or respondentia bonds; and the qualification, as to taking possession, is exclusively applied to other cases of transfer of any ship or goods at sea or abroad, by way of mortgage. And this exception is the more reasonable and just; because possession is not usually contemplated to be taken under a bottomry or respondentia bond; and a term of time after the arrival of the ship is often allowed for payment, before any proceedings can be had to enforce any right *in rem*. If we were to construe the exception in any other manner, and make it applicable to bottomry or respondentia bonds generally, unless possession were taken on the arrival of the vessel, it would create great public inconvenience, and indeed avoid the securities of bottomry and respondentia bonds in many cases; for possession cannot, under the ordinary bonds, be lawfully taken to enforce payment. Besides, the disjunctive "or," completely separates the former member of the sentence from the latter; so that we must read it, "any transfer of property under bottomry or respondentia bonds, or *any transfer* of any ship or goods at sea or abroad, if the mortgagee shall take possession, &c." of any such ship or goods at sea or abroad, as soon as may be after the arrival of the same.

The case of a bottomry bond, being, then, (as I conceive) upon the true interpretation of the statute, entirely out of its purview, this objection, in every variety of its form and pressure, seems to me to be unmaintainable. If the lien be secret, it is nevertheless sacred; for it is such as the law allows upon its own policy. It is not pretended to be a case affected by our Ship Registry Acts; and, therefore, it steers wide of any

objection to it, founded upon the peculiar provisions of the British Code. If, then, there was no necessity to record the instrument, and it is not within the Registry Acts, it can be of no consequence to the present claimants, that they purchased without notice of its existence; for such notice is not required by law, to give such a security validity against a *bonâ fide* purchaser. The only difficulties, which can arise, are those, which may result from there being a meditated fraud in the case (which is not here pretended); or some laches on the part of the bottomry lender, which will, in favor of such purchaser, operate as a waiver of the lien or mortgage on the property.

Some objection has been hinted against the bottomry bond, upon the ground, that it is not for a specific voyage, but for a great length of time. But it is very clear that a bottomry bond, may be upon time, as well as for a specified voyage. Indeed, in many cases (as in case of a bottomry bond on an East India or China voyage), the voyage may last far beyond the stipulated period in the present bond. Even in the Roman law no difference was made, whether the maritime loan was made upon a specific voyage, or for a limited time.[1] And this is clearly the law of France, and of other continental maritime countries, as it certainly is of England and America.[2]

There is another objection of a very different character, which is presented against the maintenance of the present suit. It is, that the suit was commenced before the bottomry bond became due and payable according to its terms, the suit having been commenced before the year had expired, for which the loan was made. Several answers have been given to this objection. In the first place, that it is at all events maintainable for the first

[1] Dig. Lib. 22. tit. 2. l. 4. l. 6.

[2] See 2 Emerigon Traite à la Grosse, b. i., ch. 8, § 1, 263. 2 Valin Comm. lib. 3, tit. 5, art. 2, p. 4, 5. 2 Marsh. on Insur. b. 2, ch. 4, p. 748 to 752.

half year's interest, which was clearly due; in the next place, that the insolvency of the borrowers put an end to any further proceedings in the adventure on their part; and in the last place, that the sale of the vessel to the present claimants was a virtual deviation from the risks, or an extinguishment of, or a dispensation from, any further risks, under the bottomry bond, on the part of the lenders.

In regard to the interest, it does not seem to me, that though payable semi-annually, it could be recoverable at law, unless the principal were also recoverable. If the brig had been totally lost after the time of the first semi-annual payment of interest had passed, and before the year had expired, nothing would have been payable on the bond, either for principal or interest, for, notwithstanding the preliminary recitals, the very condition of the bond demonstrates, that neither principal nor interest could accrue, unless upon the due arrival of the brig at the expiration of the risk. The insolvency, too, has no bearing upon the case, otherwise than as it may conduce to show, that the contemplated voyage or adventure was broken up; and if it was broken up, it was so by the sale and transfer of the brig to the present claimants.

The question, then, as to the breaking up of the voyage, and the consequent discharge of the libellants from any further risk, turns upon the effect of that sale and transfer. There is no doubt, that the bottomry bond originally attached by the sailing of the brig on the contemplated adventure; so that there has been a due commencement of the maritime risks, to be borne by the lenders. We may, therefore, lay out of the case all consideration of what would have been the state of things, if the maritime adventure had never, according to the contemplation of the parties, had an inception.[1] From the time of the execution of the bond, until the sale to the claimants, the brig was clearly at the risk of the lenders at sea and in port.

[1] See 2 Marshall on Insurance, b. ii, ch. 4, p. 749, 750.

Now, in point of law, there can be no doubt, that, if after the risk on the bottomry bond has commenced, the voyage, or adventure, is voluntarily broken up by the borrower in any manner whatsoever, whether by a voluntary abandonment of the voyage, or adventure, or by a deviation, or otherwise, the maritime risks terminate, and the bond becomes presently payable. All writers on the subject of bottomry treat this as indisputable, and governed by analogy to the law of insurance on the same subject. *Emerigon*, instead of discussing the subject at large, simply contents himself with saying; All that I have said in my Treatise on Insurance, upon the subject of the route, the voyage, and the places within the risk, will apply here. A voluntary change of the route, or of the voyage, discharges the lender from all ulterior risks, though the ship should return to her legitimate track.[1] And afterwards, he adds; After the risk is terminated, the borrower is bound to pay the principal and maritime interest, which he has promised.[2] *Bynkershoek* lays down the like doctrine[3]; and it is the established jurisprudence of England and America.[4] "In general (says Mr. Marshall) as soon as the risk ceases *(discusso periculo)* either by the ship's safe arrival, the expiration of the term, or any other event, the marine interest ceases, and the debt becomes absolute.[5] He afterwards adds, in another place, that the lender, like an insurer, is only answerable for losses, which happen within the time and place of the risk, as specified in the contract. Therefore, if the ship, without necessity, deviate from the voyage described in the bond, the lender will not be liable, any more than an insurer, to any loss, that may afterwards happen."[6]

[1] 2 Emer. Traité à la Grosse, ch. 8, § 4.

[2] Ibid. ch. 9, § 1.

[3] Bynk. Quæst. Priv. lib. 3, ch. 16. See, also, 1 Bell. Comm. b. iii. pt. 1, ch. 5, § 1, art. 471.

[4] 2 Marshall on Insur. b. ii. ch. 4, p. 750, 751; ch. 5, p. 755, 756, 757.

[5] Ibid.

[6] 2 Marshall on Insur. b. ii. ch. 5, p. 756, 757.

The state of the law being such as from these authorities it would seem clearly to be, that the risk of the bottomry lender terminates under the same circumstances, which would terminate the like risks upon a policy of insurance, the question, then, arises, whether in a policy of insurance upon time the risk on the subject-matter continues, after there has been an absolute sale or transfer of the property; for such is the state of the present case, as presented by the record, and insisted on by the claimants. Now, the doctrine is, as I apprehend, very clearly established, that, upon a policy of insurance, the property insured continues at the risk of the underwriter only, while the ownership of the assured continues in the property. If he sell it, or transfer it absolutely, the policy becomes void as to any future risks, and is *functus officio*. This was the doctrine of the House of Lords in *Lynch* v. *Dayrell* (3 Bro. Par. R. 497), and was affirmed by Lord *Hardwicke* in the *Sadlers' Company* v. *Babcock* (2 Atk. 554). The same doctrine is affirmed in Marshall on Insurance (B. iv., ch. 2, p. 787; Id. ch. 4, p. 800, 801, 804). The same doctrine has been repeatedly recognised in Massachusetts; and the case of *Carroll* v. *The Boston Marine Insurance Company* (8 Mass. R. 515), is directly in point. That was a policy on a vessel on time; and, before the loss, the vessel was sold to another person; and the Court held, that no subsequent loss was recoverable under the policy. The Court on that occasion said; "It has been repeatedly decided here, that, under the forms of our policies, none but the parties to the contract, or their legal representatives in case of their death, can avail themselves of the contract, although others may in fact have an equitable or even a legal interest in the property insured."

Unless, then, some distinction can be shown between the case of a policy, and the case of a bottomry bond, this doctrine concludes the question. I know of no such distinction; and there is no ground in law or equity to sustain one. The vendee, in case of a sale, is not liable to the bottomry lender for either principal or

interest; nor can he, on the other hand, entitle himself, as vendee, to any benefit of the bottomry bond. The sale of the vessel terminates all interest in the borrower; not only his interest in the voyage, but his power over the voyage. The bottomry bond is a contract for any voyage during the limited period, carried on by the borrower, as owner, and not *ultra*. And no man has a right to say, that personal confidence in the character, business, or interests of the borrower, may not have materially influenced the formation of the contract, and the undertaking of the risk.

But the present case stands upon a stronger ground; for there is certainly a direct interdiction of any such sale during the period of the risk. It is true, that the clause is contained in, or rather follows, a recital, and is inartificially drawn; but it contains terms of positive and direct obligation, which the parties are estopped to deny. The clause, to which I allude, after stating the mortgage and assignment of the brig, as security, proceeds as follows: "And it is hereby declared, that the whole of the said brig is thus assigned over for the security of the bottomry taken up by the said, &c., and shall be delivered to no other use or purpose whatsoever, until payment of this bond is first made, with the premium and interest, that may become due thereon." Can it be said, with any just regard to the true meaning of language, that this brig has not, by the sale, been delivered up to any other use or purpose, than to pay the bottomry bond? And if the brig has been so delivered up, is not the sale, in the sense of a Court of Equity (and such, for this purpose, a Court of Admiralty is, to the extent of the exercise of its own jurisdiction), a breach of the contract? My opinion is, that the risk has terminated by the abandonment of all further rights and interests in the voyages of the brig by the transfer of the owners. And I am also of opinion, that the sale of the brig constitutes *per se* a violation of the contract in its substance; and therefore, that the suit is not brought too soon.

I have thus gone, at large, over the main grounds of resistance to the present claim of the libellants, as matter fit for the cognizance and administration of an Admiralty Court. But it does appear to me, that, if the merits of the case are, as I am of opinion they are, the escape from the Admiralty Court to a Common Law Court would, to use a felicitous expression of Lord *Stowell*, only be to change postures on an uneasy bed. If this bottomry bond be a good mortgage at the common law, and do not require registration to give it validity (as I think it does not), then it is clear, that the legal property vested in the libellants; and if so, the sale to and use of the brig by the claimants, under an adverse title, is a conversion of the property, for which an action of trover would lie; and in such an action the libellants would be entitled to recover the full amount of the principal and interest due to them by the terms of the bond. There is, therefore, in substance, no controversy between the parties, but the simple question of priority of title; and when that is once settled, it is wholly immaterial in what court the other claims of the parties are to be adjusted. The latter are more a matter of calculation than of general discretionary damages.

The view of the case, which I have taken, renders it wholly unnecessary to examine into the other points suggested by the amended libel and answers, as to the earnings of the brig, and whether the conveyance was merely a security for a debt, or an absolute purchase.

I am of opinion, that the libellants are entitled to the principal sum of three thousand dollars, lent at the maritime risk, to the premium of five per cent. on that sum, and to simple interest of six per cent. on the principal sum from the time of the sale to the claimants up to the time of this decree. If there is any question as to the amount, I shall refer it to an auditor to ascertain and adjust it. *Decree accordingly.*

Robinson Potter v. The Suffolk Insurance Company.

Quære—If underwriters are liable for a loss within the terms of the policy, occasioned by the negligent or improper conduct of the master or owners.

The underwriters on the common policy of insurance, are liable for all accidents arising from any extraordinary circumstances, and not from the inherent weakness of the vessel.

Where an accident occurs in the ordinary course of grounding a vessel in a harbor, and there is no proof of inherent weakness, the loss must be attributed to some extraordinary cause, as the striking on some hard substance, or mal-position, or overlaying the dock, which would be a peril of the sea, for which the underwriters would be liable.

A ship, proved to have been stoutly built, and between two and three years old, and without any circumstance in the evidence to lead to the supposition, that she was rotten, or had at any previous period met with any calamity, having on board a small cargo, in a harbor, and at a wharf, which were usually safe for vessels of her tonnage, after taking the ground, was discovered to leak so badly, that surveyors were called, who, after a careful survey, reported the nature of her damage, and that "it was sustained by the said vessel lying badly on the ground." *Held*, that this loss cannot be attributed to any inherent weakness of the vessel, but to some extraordinary cause, and is within the perils of the sea, for which the underwriters are liable.

The effect of the memorandum clause in policies is not to enlarge the perils underwritten against, but to exempt the underwriters from certain losses, within these perils.

To constitute a stranding, within the policy, the vessel must be on the strand under extraordinary circumstances.

A loss by the ebbing of the tide is a loss by the perils of the sea, if it be not mere wear and tear, but extraordinary in its nature or mode.

This was the case of a policy of insurance, dated on 30th of March, 1830, "for $9000 on the brig *Benjamin Ruggles*, at and from New York, commencing the risk at noon on the 27th of March, 1830, to, at, and from, all ports and places to which she may proceed, for and during the term of one year from that time," with a provision for a continuation of the risk if she should be then at sea, &c. at a premium of 7 per cent. Vessel valued at $15,000. The policy contained the usual risks of

Boston policies. The declaration contained several counts. (1.) For $987,53, a proportion of general average incurred; (2.) For a total loss by perils of the seas; (3.) Count for money had and received. Plea, the general issue.

The facts not in controversy in the cause were as follow. The brig being of 296 tons burthen, perfectly seaworthy at the commencement of the voyage, sailed from New York for Philadelphia and then for London, and arrived at London. She afterwards sailed from London for Newport, in Monmouthshire in England, and safely arrived there in the latter part of June, 1830. The purpose of going to Newport was to take in a cargo of iron for New York. On the 6th of July, the brig, having discharged a part of her ballast, hauled along side the iron wharf in Newport, and on the 9th of July commenced loading, and continued to discharge ballast and load iron until the 17th of the same month, and then had on board about 290 tons of iron, which was not an undue cargo for a vessel of the size of the brig, she being capable of carrying more than 400 tons of iron. The harbor of Newport is a dry harbor, the tide rising and falling about thirty feet; the bottom, at the wharf where the brig lay, consisted of soft mud of several feet thickness, resting on a stony bottom, commonly called shingles. On the 18th of July, it was found, that the brig made a good deal of water, fourteen inches per hour. A surveyor was called, who directed the cargo to be unloaded, and the vessel put into a dry dock, in order to inspect her bottom. She was accordingly unloaded and put into a dry dock. The surveyors, in their survey, state, that upon "a strict and careful survey of the damage sustained by the said vessel, lying badly on the ground at Tredegar wharf, Pillgwenlly," (the iron wharf), they found the butt ends of the sheathing started off, the false keel very much chafed, and the scarf of it hove out. On taking off some sheathing board in the way of the bilges, keel, and garboard, they discovered the butts to be very open, and the seams in

general much strained, and in some places the oakum worked out. They afterwards, when the whole of the cargo was taken out, and the sheathing was taken off, and the bottom trimmed down clean, in pursuance of their recommendation, made a second survey, in which they state, that the butt ends and seams, fore and aft, were much strained; and several of the butts started, particularly in the bilges and bottom; several treenails bad, and butt bolts started in and out; three planks under the larboard bilge very much damaged, worm-eaten and split; the false keel much chafed, and the scarf started; the butts and seams of the water-ways, covering board and deck, strained and open. They recommended the false keel to be dubbed down, and fresh bolted; three planks under the bilge to be taken out, and replaced with three new ones (proper shifts), and bad treenails bored out; the ship properly caulked from keel to gunwale, water-ways and decks all round, and new wood sheathed. They further stated, that the lumber and rim boards were up, and none of the ground timbers were broken; but were all sound and good. The repairs were accordingly made. The brig took in a full cargo of iron, viz. about 450 tons, and safely arrived therewith at New York.

The parties agreed, that the cause should be heard by the Court, and a verdict for the plaintiff taken subject to the opinion of the Court, upon the whole evidence; and then the amount to be ascertained, if necessary, by an auditor, according to the principles decided by the Court.

The evidence was read to the Court; and the cause argued by *J. Mason* for the plaintiffs, and by *T. Parsons* and *S. Hubbard* for the defendants.

Story J. The principal claim now in controversy is for the repairs made at Newport. And the question is, whether, under all the circumstances in the case, they are a loss within the perils in the policy; or rather, as the declaration is framed,

whether, it is a loss by the perils of the seas, for which the underwriters are responsible. The brig was built in Newport (Rhode Island), in 1827, of oak and spruce of the first quality, and quite strong and stout. And no evidence exists to show, that she had, during the present, or any former voyage, sustained any such injuries as would materially impair her structure or strength. She had, in a previous voyage, carried a cargo of 400 tons of rail-road iron from the neighboring port of Cardiff, in Wales, to Philadelphia, and the loading was under circumstances not materially different from these on the present occasion, so far as the harbor and fall of the tide are concerned.

That the loss on the present occasion arose from severe straining of the vessel cannot well be doubted. But the important inquiry is, as to the cause or manner, in which it was occasioned. Was it from the ordinary manner of the ship's taking the ground in such a harbor? It is hardly to be presumed, that such could be the fact; for under such circumstances, the harbor or wharf would not be a fit place for vessels of such a burthen under any circumstances; which is not pretended, and indeed, is refuted by the evidence. If the harbor or wharf was an improper one for such a ship, and the loss was occasioned by the negligent or improper conduct of the master, then, indeed, the underwriters would not be liable for the loss, unless in those cases, in which, upon the doctrine, *causa proxima, non remota spectatur*, underwriters are held responsible for losses. Perhaps it may be thought, that the doctrine maintained in Massachusetts (contrary to what has been maintained in England and in the Supreme Court of the United States)[1], is, that no recovery can be had for a loss of this sort, caused by the negligence of the owner or the master. I do not say, that it has been definitely so adjudged in Massachusetts; but such has

[1] See *Bush* v. *Royal Exchange Insurance Company*, 2 B. & Ald. 72. *Walker* v. *Maitland*, 5 B. & Ald. 171. *Bishop* v. *Pentland*, 7 B. & Cres. 219. *The Patapsco Insurance Company* v. *Coulter*, 3 Peters R. 222.

been the course of opinion in the State.[1] But it is unnecessary to decide this point; because it cannot be doubted from the evidence, that in the ordinary course of taking the ground in this harbor, or at this wharf, the present loss would not have occurred. It must, then, have arisen either from the inherent weakness of the vessel, or from some extraordinary accident or casualty. There is no doubt, from the evidence, that such a loss might be occasioned by the vessel striking on some hard substance, or from the vessel overlaying her dock, or from some mal-position. Some of the witnesses assert, that accidents of the like sort have occurred in this very harbor from such overlaying the dock or mal-position. The Captain of the brig, however, attributes this very loss to another circumstance, viz. the striking upon some hard substance. But, whether it was occasioned in the one way, or in the other, or in any other unknown manner, if it was not such a loss as would ordinarily occur in taking the ground at that wharf on the ebbing of the tide, and it was not in truth occasioned by the inherent weakness of the vessel itself, it is not material; for the underwriters are responsible for all accidents of this sort occasioned by the recess of the tide, where they arise from extraordinary and extraneous circumstances, and not from such inherent weakness. Striking on a hard substance would be such an extraordinary accident. But it is only one instance, illustrative of the rule, and not itself of the essence of the rule. Any other accident, not in the usual course of grounding on the recess of the tide, but arising from some unexpected and unusual cause, would be equally within the rule. There is no doubt, that any injury, which must arise in the ordinary course of grounding at every tide in a tide harbor, is not a loss within the policy; but it is treated as the ordinary wear and tear of

[1] See *Brazier* v. *Clap*, 5 Mass. R. 1. *Cleveland* v. *Union Insurance Company*, 8 Mass. R. 321. *Ellery* v. *The New England Insurance Company*, 8 Pick. R. 14, 22.

the voyage. There must be some extraordinary injury, not arising from the ordinary course of the navigation to make the underwriters responsible.

It appears to me, that this view of the matter is fully borne out by the authorities. The case of *Fletcher* v. *Inglis* (2 B. & Ald. 315) is directly in point. There, a transport in the government service, insured on time, was moored in the harbor of Boulogne, near one of the quays. The harbor of Boulogne is a dry harbor, with a hard uneven bottom, and upon the recess of the tide, the ship took the ground and struck hard, and received some injury in several of her knees, for which the suit was brought. The question was, whether the loss was a loss by the perils of the sea within the meaning of the policy. The argument was, that it was a mere taking of the ground under ordinary circumstances; and, therefore, the injury was but ordinary wear and tear; and that it did not arise from any extraordinary accident, which would be a peril of the sea. But the Court were of opinion, that the loss was by the perils of the sea. Now, the sole ground of this determination must have been, that the loss was not such, as would naturally and commonly occur by the ordinary grounding; for then it would be mere wear and tear; but that it was unusual and extraordinary in character and degree. The case of *Thompson* v. *Whitmore* (3 Taunt. 227), is clearly distinguishable. There, the loss was, while the vessel was hauled down on a beach to be cleaned and caulked; and, when the tide fell, some of the planks of the side, on which she lay, gave way, and some of her foot hooks were broken; and it was held, that, as the damage happened on land, it was not a loss by the perils of the sea; which was the only loss declared on. *Bancroft* v. *Dunmore*, there cited, was decided on the same ground. In *Phillips* v. *Barker* (5 B. & Ald. 161), the loss under like circumstances was held not to be by perils of the sea, but still that it was a loss within that policy.

The cases on the memorandum clause, in the common policies, so far from impugning, fortify the doctrine. They all proceed upon the definition of what constitutes a stranding in the sense of the policy,—so as to let in all losses by the ordinary perils, within the policy. Now, if the losses in those cases, supposing there were no memorandum clause, would not be within the policy, it would be wholly unnecessary to consider, whether there was a stranding, or not; for the underwriters would not be liable, either way, for the loss. The memorandum clause does not operate as an enlargement of the perils underwritten against; but it operates to exempt the underwriters from certain losses within those perils. It seems to me, that those cases are founded in entire good sense. They decide this general principle, that where the vessel, in a tide harbor, takes the ground in the ordinary way upon the ebbing of the tide, it is not a stranding within the policy, although, in common language, the vessel is on the strand. But, to constitute "stranding," she must be on the strand under extraordinary circumstances, or from extraneous causes. I do not go over the cases. They are commented on with great ability and clearness in *Welles* v. *Hopwood* (3 B. & Adolph. 20), and *Kingsford* v. *Marshall* (8 Bing. R. 458), which contain all the learning upon the subject. But in none of those cases was there any doubt, that the loss itself, except for the memorandum clause, would have been a loss within the policy. In *Kingsford* v. *Marshall* (8 Bing. R. 462), Lord Chief Justice *Tindal* prefaced his able opinion by saying, "That the injury done to the ship or goods, by settling on a hard substance at the bottom of the harbor (which was the case before the Court), would be a damage recoverable on a policy on a ship, or a policy on goods, not included in the memorandum, as an injury occasioned by perils of the sea, is beyond all doubt." It thus affirms the principle, that the loss by the ebbing of the tide is a loss by perils of the sea, if it be not mere wear and tear, but extraordinary in its nature or mode. If a ship should,

in taking the ground, fall over, and thereby bilge (which would be no ordinary injury, but an unusual accident), it would be a loss by perils of the sea, just as much as it would be if done by striking on a hard substance. This seems also to have been the doctrine in *Carruthers* v. *Sydenbotham* (4 M. & Selw. 77), as it certainly was in *Wells* v. *Hopwood* (3 B. & Adol. R. 20), and *Bishop* v. *Pentland* (7 B. & Cresw. 219). The case of *Fletcher* v. *Inglis* (2 Barn. & Ald. 314) did not turn upon any distinction, whether the injury was by a hard or by a soft substance; but upon the point, whether it was an ordinary injury, or an extraordinary accident. Unless, therefore, that case is to be overturned, and it has no where been questioned or denied, it governs the present, if the present injury was not from the inherent debility of the ship; for no person pretends, that it was the ordinary wear and tear in grounding in the harbor of Newport. The only case, which can, as I think, be deemed to lead in the opposite direction upon this point, is *Hearne* v. *Edmunds* (1 Brod. & Bing. 388). That case, however, turned, not upon any question, as to the loss being a loss by the perils of the sea; but, whether it was a case of stranding. So it has been understood in all subsequent discussions on the same subject; and if otherwise understood, it would be irreconcilable with other decisions.

The present case is, therefore, after all, narrowed down to the consideration, whether the loss was from the inherent weakness of the vessel; for if it was not from such weakness, it was occasioned by an unusual and extraordinary accident in grounding, upon the ebbing of the tide, which would be a peril of the sea. Upon examining the testimony, it does not strike me, that there is any sufficient proof of such weakness. So far as the proof goes, it seems to me to be, if not altogether, at least by a great preponderance of weight, the other way. In the first place, the original built and age of the vessel will not justify any such conclusion. She is proved to have been strongly and stoutly

built. She was only between two and three years old; and there is nothing in the whole evidence to lead to the slightest supposition, that she was rotten, or had, at any previous period, met with any calamity, which could render her either infirm, or incapable of carrying such a cargo. On the contrary, in a prior voyage she had taken on board a cargo of rail-road iron of 400 tons at the neighboring port of Cardiff, where the tide ebbs and flows in the like manner, without the slightest complaint or injury. In the next place, she was not, at the time of this accident, heavily laden. She had on board only about 290 tons of iron, which no one now pretends was either a burthensome or overloaded cargo for her in such a harbor; and the wharf, where she lay, was a safe wharf for vessels of her tonnage. The principal foundation, upon which the argument of her inherent weakness rests, is, that she was so greatly strained and injured, that it could not have arisen from the ordinary wear and tear of grounding in her local position, or from her cargo, which was not a heavy cargo; and, therefore, it must have arisen from her inherent weakness. Now, there is this difficulty in the very structure of the argument, that it does not provide for certain other events, either of which was capable of producing the same effects, viz: striking on a hard substance in grounding, or overlaying her dock, or accidentally taking the ground in a mal-position, or at an unsuitable point, so as to throw an unusual and extraordinary strain upon the parts of the vessel, which sustained so much injury. Besides; this supposed inherent weakness is not only not established by the antecedent history of the vessel in other voyages; but it is in apparent opposition to her subsequent history. In this very voyage, after the repairs were made upon her (which were not great) she took on board a cargo of 450 tons of iron, and brought it safely home; and in other voyages she has carried cargoes equally burthensome. It seems to me exceedingly difficult to maintain, that, under such circumstances, there is any just ground to attribute the injury to any

inherent incapacity of the vessel to bear such a cargo in the ordinary way, in such a harbor, at the ebb of the tide. It is no answer to say, that, in fact, she proved too weak to bear it. It is necessary to show, that such inability was the result of her intrinsic weakness, and not of any extraordinary or extraneous cause.

My opinion, upon a full survey of the evidence, is, that the loss is not attributable to any inherent weakness of the vessel, but is attributable to other extraneous and extraordinary causes, such as striking some hard substance, or mal-position, or bad taking of the ground, or overlaying the dock. If attributable to any such extraneous and extraordinary cause, taking effect by reason of the ebbing of the tide, it is in my judgment a loss by perils of the sea, for which the underwriters are responsible.

The verdict for the plaintiff is, therefore, correct in principle; and the cause will be referred to an Auditor, to ascertain the amount, to which the plaintiff is entitled.

The Brig Sarah Ann, Obadiah Woodbury and others, Claimants.

In Admiralty Pleadings, the better practice is to present new facts, when necessary, by an amendment to the libel and answer, as in Chancery, and not by way of replication and rejoinder.

The proofs and allegations must coincide. Proofs to facts not put in contestation by the pleadings, and allegations of facts not established by proofs, will both be rejected.

Appellate Courts in Admiralty allow parties, under certain circumstances, *non allegata allegare, et non probata probare.*

An abandonment once made is considered as a continuing abandonment, notwithstanding a refusal to accept it, unless it is withdrawn by the party offering it.

The master is the agent of all concerned in the voyage, and, whenever an abandonment has been accepted, becomes, by relation, the agent of the un-

derwriters from the time of the loss, and a sale by him is then on account of the underwriters.

A valid sale may be made of personal goods, which are out of possession, and the sale will be of the thing itself, and not of a mere *chose in action*.

If an owner stands by and knowingly suffers an innocent person to be misled by his silence, and to purchase his property without giving him notice of his title, a Court of Equity will treat it as a fraud upon the purchaser, and grant an injunction against the future assertion of that title by the owner.

Courts of Admiralty, so far as their jurisdiction extends, administer it upon the principles of a Court of Equity, and not upon those of strict law.

Courts of Admiralty, like Courts of Equity, govern themselves by the analogies of the common law limitations of actions, and, only under very strong circumstances, depart from them. Independently of any limitations, they will not entertain suits for stale demands.

Where the acceptance of an abandonment occurred in October, 1828, (which related back to the loss in the preceding March), and the libel was brought in September, 1834: *Held*, that, if the vessel had been within the reach of the process of this Court for a reasonable time, to the knowledge of the libellants, after such a lapse of time, the libel ought not to be maintained.

It is not sufficient to justify a sale of a vessel by a master, that he acted in good faith, and in the exercise of his best discretion, unless there appears to have been an urgent necessity to sell for the preservation of the interests of all concerned.

If an owner of reasonable prudence would have directed the sale from the opinion, that the vessel could not be delivered from the peril without the hazard of an expense, disproportionate to her real value, then the sale by the master must be deemed justifiable.

In a case of urgent necessity, the master has a right to sell the vessel, as well on a home shore, as on a foreign shore, and whether the owner's residence be near or at a distance. It is otherwise, if the necessity be not urgent.

A sale by a master held valid, under the circumstances, and after a survey of the evidence, on the ground of urgent necessity.

Semble—If the Court should decree a sale by the master invalid, where the transaction was clear from fraud, it would compel a proper allowance for the expenditures of the original purchasers in getting off and repairing the vessel.

THIS was a case of an appeal from a *pro formâ* decree of the District Court, sitting in Admiralty, dismissing the suit. The original libel was a proceeding *in rem* in the nature of a peti-

tory suit in the Admiralty, for the ascertainment and establishment of the title of the libellants (The New England Marine Insurance Company) to the proprietary interest of the brig Sarah Ann, and, as consequent thereon, for a decree for the possession of the vessel.

It appeared from the proceedings and proofs in the cause, that the libellants, on the first day of March, 1828, at Boston, underwrote a policy of insurance upon the brig valued at $4,000, in port and at sea, during the term of one year, from the 22d of February, 1828; and while the policy was in full force, to wit, on the 25th of March, 1828, the brig was stranded on the shore of the Island of Nantucket, in the State of Massachusetts; and on the succeeding day an abandonment was made by the owners to the libellants, for a total loss by the perils of the sea. The abandonment was not, however, at that time accepted by the libellants; but was expressly refused. It was not, however, withdrawn by the owners; and finally, on the third day of October, 1828, a compromise took place between the owners and the libellants, by which all the right and title of the owners in the brig was assigned to the libellants. This constituted the title set up by the libellants.

The claimants did not deny these facts; but they asserted a title to the brig (as intermediate purchasers), derived under a sale made by the master after the stranding, upon the ground of an alleged necessity; and no question was made as to the regular derivation of their title, if the sale of the master was justifiable in point of law, under all the circumstances.

The case was argued by *S. Hubbard* for the libellants; and by *C. P. Curtis*, for the claimants.

Story J. I regret, that the pleadings in this case do not present all the points made in argument in a clear and definite form. The old course of practice, indeed, was to introduce additional matters by way of replication and rejoinder; but the modern,

and certainly the better practice, is to present new facts, when rendered necessary, in an amendment of the libel and answer, as is the ordinary course in Chancery. There is, too, a want of certainty and precision in some of the allegations on both sides, which is somewhat embarrassing; for, although the Admiralty proceedings do not partake of the severe strictness of the common law, they do yet require, that all material facts should be stated with convenient certainty as to times, and facts, especially when they are the turning points of the cause. However, as no exceptions on this head have been taken at the hearing, they must be deemed to be waived by the parties, though not without inconvenience to the Court.

The principal, though not the sole question, arising in the case is, whether the sale was under all the circumstances a valid sale. Before, however, proceeding to the consideration of this question, it may be well to dispose of some minor objections, which are taken to the title of the libellants. In the first place, it is said, that the title of the libellants, under the abandonment, cannot be maintained, because it was not accepted at the time when the sale was made by the master; but it was at that time utterly rejected; and that the subsequent title under the assignment, not being propounded in the pleadings, is not matter properly in contestation in the suit; for the cause must stand before the Court to be heard, *secundum allegata et probata.* It is certainly true, that the proofs and the allegations must coincide; for if there be proofs to facts not put in contestation by the pleadings, or allegations of facts not established by proofs, in each case they must be rejected. But, as I understand the posture of the present case before the Court, the assignment is not now offered as a substantive proof of the creation of an original title, but merely as proof of the final acceptance of the title by abandonment under a compromise; and if so, then, by the final acceptance of the abandonment, the title of the libellants relates back to the time of the loss, and takes effect, retroactively from that

also agree, that a Court of Admiralty, so far as it possesses jurisdiction, does administer it upon the principles, not of strict law, but upon the principles adopted by Courts of Equity. And, if this case stood upon proofs of this sort, going directly to the point, I should not hesitate to say, that for this ground alone the Court would be bound to dismiss the libel.

But the facts of the present case, present a clear distinction. At the time when the transactions in Boston took place, the title was in contest between the original owners, and the underwriters. The latter did not claim or assert any title, but denied the abandonment to be good. And on the contrary, the original owners insisted, that the abandonment was good. So that neither party was in a situation to assert a title, without compromitting rights then actually in contestation. And it was, therefore, under such circumstances the duty of the purchaser to look to his title-deeds, and to satisfy himself by all due inquiries of the true nature and validity of his title; for the maxim of law, *caveat emptor*, strictly applied to him. So far, indeed, were the libellants from acquiescing in, or countenancing this sale, that the letter of the 14th of May expressly establishes their determination to contest it.

Then, as to the lapse of time, which is relied on as another point of objection to the maintenance of the present libel. The abandonment was in March, 1828; and the final acceptance of it, if at all, was in October of the same year. The present libel was filed in September, 1834, after the lapse of nearly six years. Now, Courts of Admiralty, like Courts of Equity, govern themselves in the maintenance of suits by the analogies of the common law limitations; and are not inclined, unless under very strong circumstances, to depart from those limitations. But, independently of any statutable limitations, Courts of Admiralty will not entertain suits for stale demands. The party, who seeks redress there, must come within a reasonable time, or the Court will not incline to exert its powers actively in his behalf. And

if there were suitable allegations and proofs in this cause, that, after the final acceptance of this abandonment in October, 1828 (which, as we have seen, must relate back to the loss in the preceding March), the brig had been within the ports of Massachusetts, and within the reach of the process of this Court, for a reasonable time, to the knowledge of the libellants, I should much incline to the opinion, that after such a lapse of time the libel ought not to be maintained. But no such allegations and proofs are brought forward, so as to justify the Court in such a proceeding.

We are, then, driven to the consideration of the question already suggested, whether the sale made by the master was, under all the circumstances, justified by necessity. If it was, the title of the claimants is unexceptionable. If it was not, then it seems to me, that the libellants are entitled to a decree for possession upon their title under the abandonment.

The facts, as stated in the protest, are as follow. The brig, having on board a cargo of rice and cotton, sailed on a voyage from Savannah for Boston, and, on the 23d of March, 1828, was stranded on the south-west side of the island of Nantucket. On the next day, assistance was obtained from the shore, and the anchors were got out and hove tight, in order to start the vessel, but without success. In the course of the forenoon, the wreck-master came on board with twenty men, and pursuant to his directions, the deck-load was thrown overboard. They then hove on the cables again, but with no beneficial effect. They then proceeded to open the hatches, and discharge the cargo from the hold; and then hove on the cables again, but to no purpose, as the tide had fallen, and there was a considerable surf rolling in shore. The captain and crew remained on board that night; and the day following nothing could be done, as the wind blew strong at the south-east, and there was a heavy surf. After the weather moderated, the cargo was, with much difficulty, got on shore. The wind and the surf of the sea had driven the

brig so far on shore, as to render it impossible to get her off. Such is the statement of the protest, which, in many of the important particulars, is corroborated by the other evidence in the case. It further appears from the evidence, that the place, where the brig was stranded, was a sandy beach, about twelve miles distance by sea and six miles by land from the town of Nantucket, and that she was at no time high and dry there. The depth of water about her varied; sometimes it was ten feet, and sometimes six feet; and she was no time of the tide out of water. The cargo was discharged in about *five* days; and the spars, sails and rigging were then stripped off and carried on shore, and sold in small lots to the highest bidders. After the cargo was discharged, the brig became loose in the sand, and slewed round, and lay with her broadside to the shore. She was sold on the 28th day of March, by the master, at public auction, where she lay, for $127, at the same time that the spars, sails, and rigging were sold. The latter brought $422 40.

No efforts appear to have been made after the brig was unladen, to get her off from the shore, though she had not then sustained any serious injury. Three intelligent surveyors, at a subsequent period, estimated the cost of repairs of her hull as not exceeding the sum of $492 25. The brig was gotten off by the purchasers soon after the sale, and was carried to the port of Nantucket, and there repaired. The whole cost of the brig to the purchasers, including her repairs, and outfits to Boston, is represented to have been $2494 67; and she was actually sold, under their orders, at Boston, in July, 1828, for the net sum of $2736 41.

Such being the general outline of the facts in evidence, the question is, whether, connecting these facts with the opinions of the witnesses given in the case, the necessity of the sale is clearly made out. I agree at once to the doctrine, that it is not sufficient to show, that the master acted with good faith, and in the exercise of his best discretion. The claimants (upon

whom the *onus probandi* of the validity of the sale is thrown) must go farther, and prove, that there was a moral necessity for the sale, so as to make it an urgent duty upon the master to sell for the preservation of the interest of all concerned. And I do not well know, how to put the case more clearly than by stating, that if the circumstances were such, that an owner of reasonable prudence and discretion, acting upon the pressure of the occasion, would have directed the sale from a firm opinion, that the brig could not be delivered from the peril at all, or not without the hazard of an expense utterly disproportionate to her real value, as she lay on the beach, then the sale by the master was justifiable, and must be deemed to have been made under a moral necessity. And this I consider the true doctrine deducible from the case of *Gordon* v. *The Massachusetts Fire and Marine Insurance Company* (2 Pick. R. 249), where the subject is examined very much at large and with great ability.

It has been suggested at the argument, that as the stranding was on a home shore, at no great distance from the residence of the agent of the owners, the master was not authorized to sell without consulting the agent or the owners. I agree at once to the position, if there is no urgent necessity for the sale. But if such an urgent necessity does exist, as renders every delay highly perilous, or ruinous to the interests of all concerned, the duty of the master is the same, whether the vessel be stranded on the home shore or on a foreign shore, whether the owners' residence be near, or be at a distance. I am aware of the doctrine maintained by my brother, the late Mr. Justice Washington, in *Scull* v. *Briddle* (2 Wash. Cir. R. 150); and, unless it is to be received with the qualification above stated, I cannot assent to it.

The fact, that the brig was actually gotten off by the purchasers after the sale, is certainly a strong circumstance against the necessity of the sale. But it is by no means decisive; for we are not, in cases of this sort, to judge by the event; for a ves-

sel may be apparently in a desperate situation, and yet by some lucky accident, or unexpected concurrence of fortunate circumstances, she may be delivered from her peril. We must look to the state of things, as it was at the time of the sale; and weigh all the circumstances; the position and exposure of the brig; season of the year; the dangers from storms; the expense of any attempts to get her off; the probable chances of success; and the necessity of immediate action on the part of the master, one way or the other.

As to the position of the brig, there is abundant evidence, that it was truly perilous. She was on an open shore of shifting sand, exposed to the constant action of the surf, and in case of a storm, to the full fury of the wind and sea. Indeed, the testimony is exceedingly strong, and I had, almost said, conclusive, that if a southerly storm had occurred after the sale, and before the brig was gotten off, she would have gone to pieces. One did occur, a few hours after she was gotten off, which several of the witnesses think would have been fatal to her, if she had been on the shore. The probability of a storm, at that season of the year, upon our coast, is too well known to require any comment. It is the very season of blustering and variable weather, which has rendered the vernal equinox proverbial for its dangers and uncertainties. Some unsuccessful efforts had been already made to get the brig off; and a storm, which had already taken place, had driven her higher up, and broadside to the shore, and of course had placed her, being constantly in the surf, in a more hazardous situation. Considerable expense would necessarily be incurred in any new attempts to get her off, because the cables and anchors, and purchases used on a former occasion had been left in the surf, and could not be regained; and if the probability of success was small, this very expense would be a dead loss to all concerned. If a storm should, in the mean time, take place, a total wreck would be almost inevitable. We find, too, from the evidence, that, of all the vessels

stranded upon the shore of Nantucket, a very small proportion have ever been gotten off. A list of such vessels is appended to the evidence, which establishes this fact beyond controversy. One of the witnesses (a very experienced merchant and wreck-master) says, that there has not been a brig or ship got off from the south and west seaboard of the island of Nantucket for twenty years before the Sarah Ann, except the brig Pearl.

The circumstances, attending the sale, are also fit to be brought under review. Full public notice appears to have been given; and a large company attended. The sale appears to have been fairly and freely conducted; and no combination is suggested to affect the biddings, or to produce a sacrifice of the property. Several of the witnesses testify, that they went there to bid for the vessel; but that she was sold for a price beyond what they thought her worth, or they were willing to give. Now, certainly, under such circumstances, a sale in the immediate neighborhood of a populous and flourishing seaport of great intelligence and enterprise, for so small a sum as about $549 for the hull, spars, sails, and rigging, does indicate a very strong opinion in those present, that the chances of saving the brig were few, and her situation was eminently perilous. The hull, rigging, and other appurtenances sold for a sum less than one seventh of the valuation in the policy of insurance. The necessary repairs to put the brig in order, if she should be gotten off, are admitted to be properly estimated at $492. To these must be added, the expenses for the rigging, &c. estimated at about $444, and of getting off the brig, estimated at about $1205, making in the whole an outlay, by the purchasers, according to their estimate, of about $2690, a sum sufficiently startling to be given for a stranded vessel, valued at $4000 in the policy, and in all probability a very high valuation, and then in a state of peril, from which it was uncertain, whether she could ever be delivered.

It is said, that some of these charges and expenditures are

over-estimated and imaginary. But the clerk of one of the purchasers, who settled the accounts, swears, that the whole cost of the brig, including the expense of getting her off, and repairing her and her outfits, amounted to $2,494 73; and that the purchasers settled the account between themselves, and adjusted the balance upon the footing of that amount. Even if we were to strike off one fifth part from this amount for any supposed over-estimate, it would still appear, that an expenditure equal to one half of her valuation was indispensable to restore her to her former state. But to this in all fairness must be added the positive risk of a total loss of the brig upon the shore. In point of fact, the brig was afterwards (as we have seen) sold at Boston for $2,736, so that even in the successful events, which were anticipated, she brought little more than an indemnity to the purchasers.

In regard to the opinions of the witnesses, that the brig was capable of being gotten off, and that farther efforts ought to have been made for that purpose, there is the testimony of Mr. North, who assisted in discharging her, who speaks pointedly and affirmatively on the subject. He was on the spot, and doubtless he is on that account a witness of peculiar competency. The mate and one of the seamen, of the brig, also speak to the same point with equal decision. But their testimony is of less weight, because they were unacquainted with the shore, never having been at Nantucket before or since that occasion. Capt. Adams, also, who was the agent of the underwriters, expresses a similar opinion. But as he was not present, while the brig was ashore, and as he had never been at Nantucket at any other time, his testimony certainly is not so stringent, as it otherwise would be. But, what is most material in the consideration of this testimony is, that so far as it respects getting off the brig, it proceeds upon the supposition, that the weather should continue favorable, and no storm should occur.

If the case were to be decided by this testimony alone, I con-

fess, that I should incline to listen to it with great confidence in its accuracy. But it is encountered by very strong testimony on the other side, coming from numerous witnesses, inhabitants of the island, who are well acquainted with the shore, and with the situation of the brig. They express a very decided opinion, that the conduct of the master in directing the sale was prudent and proper under the circumstances; that the brig was in a perilous situation, with little chance of being gotten off; and in case of a storm, with almost a certainty of going to pieces; that the brig was sold for as much as she was worth in her then situation, and for more than some of them were willing to give. And this, in an especial manner, in the opinion of the wreck-master, who went on board in the morning after the stranding, and continued to assist in all the operations, until the sale was completed; and his judgment must have had great weight with the master in all that he did, and all that he left undone. Under such circumstances, as a man of great experience, and a public officer, and entirely disinterested, I cannot but place great confidence in his judgment. He had peculiar means of forming a correct judgment, not only from his intimate knowledge of the coast, and the disasters thereon, but from his having been often employed as an agent in cases of wrecked vessels. He is fully confirmed in all his statements by another witness, who has also acted as a wreck-master and agent for a considerable number of years, and assisted in all the arrangements made in the case of the Sarah Ann, who says, "that if the brig had not gone off in two days more, in my opinion, she would have been all in pieces. Where she lay was a sandy bank and bars without her. The sand was continually shifting around the wreck by the heave of the sea."

Now, when this testimony is connected with other established facts in the case, and especially with the season of the year, the imminent danger from any succeeding storms, the rareness of any successful efforts to get off any large vessels stranded on

that shore; and the actual expenditure of a sum, fully equal to one half or more of the value of the brig, in order to refit her, and bring her to a suitable market for sale, it does seem to me difficult to resist the impression, that there was in the present case a moral necessity imposed upon the master to sell. I do not say, that the case is beyond all doubt; but it appears to me established by a weight of testimony and circumstances, which I am not at liberty to resist.

I feel the less difficulty in having arrived at this conclusion, because if I had felt it my duty to decree possession to the libellants, grounded upon the invalidity of the sale, the decree must have been upon the terms of making all due allowances to the claimants, for the expenditures of the original purchasers in getting off the vessel and repairing her. This is the case of a clear *bonâ fide* purchase, under circumstances calling for no inconsiderable indulgence, even if the strict law had been against the title. The general practice of the Admiralty in all such cases is, to restore possession upon making compensation for all meliorations by the purchaser.[1] It is an equitable principle, analogous to that, which is constantly acted upon in Courts of Equity, and probably borrowed from the same common source, the civil law. And if meliorations ought to be decreed generally, *a fortiori*, the actual disbursements and expenses ought to be allowed, which were incurred to deliver the vessel from her peril; for they are in the nature of salvage. Where, indeed, the title is not only invalid, but the transaction is tainted with fraud or ill faith (which is not pretended in the present case), the rule would be different.

Upon the whole, my opinion is, that the decree of the District Court, dismissing the libel, must be affirmed with costs.

[1] See the *Perseverance*, 2 Rob. R. 239. Nostra de Conceicas, 5 Rob. R. 294.

CIRCUIT COURT OF THE UNITED STATES.

Summer Circuit.

RHODE ISLAND, JUNE TERM, 1835, AT NEWPORT.

BEFORE { Hon. JOSEPH STORY, Associate Justice of the Supreme Court.
Hon. JOHN PITMAN, District Judge.

SAMUEL JENCKS *v.* ROBERT B. COLEMAN.

The proprietors of the steamboats between Providence and New York are common-carriers, and, as such, bound to receive all persons on board, to whose character and conduct there is no reasonable objection, if they have suitable accommodations.

They may rightfully exclude all persons of bad character or habits—all whose objects are in any way to interfere with their interests, or to disturb their line of patronage, and all who refuse to obey the reasonable regulations, which are made for the government of the steamboat; and they may rightfully inquire into the habits or motives of passengers, who offer themselves.

An innkeeper would not be bound to entertain an agent of a rival inn, who sought to decoy away his customers.

The plaintiff was the known agent of the *Tremont* line of stage-coaches; the proprietors of the steamboat Benjamin Franklin had, as he well knew, entered into a contract with the *Citizens'* Stage Coach Company, to carry passengers between Boston and Providence, in connexion with, and to meet the steamboats. The plaintiff had been in the habit of coming on board the steamboat, at Providence and Newport, for the purpose of soliciting passengers for the Tremont line: *Held*, If the jury should be of opinion, that the above contract was reasonable and *bonâ fide*, and not en-

tered into for the purpose of an oppressive monopoly, and that the exclusion of the plaintiff was a reasonable regulation, in order to carry this contract into effect, that the proprietors of the steamboat would be justified in refusing to take the plaintiff on board.

CASE for refusing to take the plaintiff on board of the steamboat *Benjamin Franklin* (of which the defendant was commander), as a passenger from Providence to Newport. Plea, the general issue.

The facts, as they appeared at the trial, were substantially as follow: That the plaintiff was the agent of the Tremont line of stages, running between Providence and Boston; that his object was to take passage in the boat to Newport, and then go on board the steamboat President, on her passage from New York to Providence, on the next morning, for the purpose of soliciting passengers for the Tremont line of stages for Boston. This the proprietors of the President, and Benjamin Franklin had prohibited, and had given notice that they would not permit agents of that line of stages to take passage in their boats for that purpose. The reason assigned for such prohibition was, that it was important for the proprietors of the steamboats, that the passengers from their boats, for Boston, should find, at all times, on their arrival at Providence, an immediate and expeditious passage to Boston. To insure this object, the Citizens' Coach Company had contracted with the steamboat proprietors, to carry all the passengers, who wished to go, in good carriages, at reasonable expedition and prices; and the commanders of the steamboats were to receive the fare, and make out way-bills of the passengers, for the Citizens' Coach Company. This they continued to perform. And, in order to counteract the effect of this contract,—which had been offered the Tremont line, and declined,—that line placed an agent on board the boats, to solicit passengers for their coaches; and, on being complained to by the Citizens' Coach Company, the proprietors of the steamboats interdicted such agents from coming

on board their boats. And in this instance, refused to permit the plaintiff to take passage in the boat for Newport, though he tendered the customary fare.

The cause was argued by *R. W. Greene* and *Daniel Webster* for the plaintiff, and by *Rivers* and *Whipple* for the defendants.

For the *plaintiff* it was contended, that steamboat proprietors were common-carriers,—and every person, conducting himself with propriety, had a right to be carried, unless he had forfeited that right.

The plaintiff in this instance did conduct with propriety, and had not forfeited his right to be carried, by any improper misconduct.

The steamboat proprietors, and Citizens' Coach Company, had attempted to establish a monopoly, which should not be countenanced, it being against the public interest. Such a monopoly operated to increase the price and prolong the time of passage from Providence to Boston; while open competition promoted the public interest and convenience, by reducing the fare and expediting the passage.

The plaintiff, in this instance, requested to be conveyed from Providence to Newport; during which passage, it was well known, no passengers were to be solicited—that was to be done only on the passage from Newport to Providence.

For the *defendant*, it was contended, that the contract made by the steamboat proprietors and the Citizens' Company, was legal, and subserved the public convenience, and the interest of the proprietors of the boats and stages. It insured to the passengers expeditious passages at reasonable prices; that the regulation, excluding the agents of the Tremont line of stages from the steamboats, was legal and just, because it was necessary to promote the foregoing objects, to wit: the public convenience, and the interests of the proprietors of both the boats

and stages. Of this interdiction the plaintiff had received notice, and had no legal right to complain.

Story J. in summing up to the jury, after recapitulating the evidence, said; There is no doubt, that this steamboat is a common-carrier of passengers for hire; and, therefore, the defendant, as commander, was bound to take the plaintiff as a passenger on board, if he had suitable accommodations, and there was no reasonable objection to the character or conduct of the plaintiff. The question, then, really resolves itself into the mere consideration, whether there was, in the present case, upon the facts, a reasonable ground for the refusal. The right of passengers to a passage on board of a steamboat is not an unlimited right. But it is subject to such reasonable regulations as the proprietors may prescribe, for the due accommodation of passengers and for the due arrangements of their business. The proprietors have not only this right, but the farther right to consult and provide for their own interests in the management of such boats, as a common incident to their right of property. They are not bound to admit passengers on board, who refuse to obey the reasonable regulations of the boat, or who are guilty of gross and vulgar habits of conduct; or who make disturbances on board; or whose characters are doubtful or dissolute or suspicious; and, *a fortiori*, whose characters are unequivocally bad. Nor are they bound to admit passengers on board, whose object it is to interfere with the interests or patronage of the proprietors, so as to make the business less lucrative to them.

While, therefore, I agree, that steamboat proprietors, holding themselves out as common-carriers, are bound to receive passengers on board under ordinary circumstances, I at the same time insist, that they may refuse to receive them, if there be a reasonable objection. And as passengers are bound to obey the orders and regulations of the proprietors, unless they are oppressive and grossly unreasonable, whoever goes on board, under

ordinary circumstances, impliedly contracts to obey such regulations; and may justly be refused a passage, if he wilfully resists or violates them.

Now, what are the circumstances of the present case? Jencks (the plaintiff) was, at the time, the known agent of the Tremont line of stage coaches. The proprietors of the Benjamin Franklin had, as he well knew, entered into a contract with the owners of another line (the Citizens' Stage Coach Company) to bring passengers from Boston to Providence, and to carry passengers from Providence to Boston, in connexion with and to meet the steamboats plying between New York and Providence, and belonging to the proprietors of the Franklin. Such a contract was important, if not indispensable, to secure uniformity, punctuality, and certainty in the carriage of passengers on both routes; and might be material to the interests of the proprietors of those steamboats. Jencks had been in the habit of coming on board these steamboats at Providence, and going therein to Newport; and commonly of coming on board at Newport, and going to Providence, avowedly for the purpose of soliciting passengers for the Tremont line, and thus interfering with the patronage intended to be secured to the Citizens' line by the arrangements made with the steamboat proprietors. He had, the fullest notice, that the steamboat proprietors had forbidden any person to come on board for such purposes, as incompatible with their interests. At the time when he came on board, as in the declaration mentioned, there was every reason to presume, that he was on board for his ordinary purposes as agent. It has been said, that the proprietors had no right to inquire into his intent or motives. I cannot admit that point. I think, that the proprietors had a right to inquire into such intent and motives; and to act upon the reasonable presumptions, which arose in regard to them. Suppose a known or suspected thief were to come on board; would they not have a right to refuse him a passage? Might they not justly act upon the presumption, that his

object was unlawful? Suppose a person were to come on board, who was habitually drunk, and gross in his behavior, and obscene in his language, so as to be a public annoyance; might not the proprietors refuse to allow him a passage? I think they might, upon the just presumption of what his conduct would be.

It has been said by the learned counsel for the plaintiff, that Jencks was going from Providence to Newport, and not coming back; and that in going down, there would, from the very nature of the object, be no solicitation of passengers. That does not necessarily follow; for he might be engaged in making preliminary engagements for the return of some of them back again. But, supposing there were no such solicitations, actual or intended, I do not think the case is essentially changed. I think, that the proprietors of the steamboats were not bound to take a passenger from Providence to Newport, whose object was, as a stationed agent of the Tremont line, thereby to acquire facilities, to enable him successfully to interfere with the interests of these proprietors, or to do them an injury in their business. Let us take the case of a ferryman. Is he bound to carry a passenger across a ferry, whose object it is to commit a trespass upon his lands? A case, still more strongly in point, and which, in my judgment, completely meets the present, is that of an innkeeper. Suppose passengers are accustomed to breakfast, or dine, or sup at his house; and an agent is employed by a rival house, at the distance of a few miles, to decoy the passengers away, the moment they arrive at the inn; is the innkeeper bound to entertain and lodge such agent, and thereby enable him to accomplish the very objects of his mission, to the injury or ruin of his own interests? I think not.

It has been also said, that the steamboat proprietors are bound to carry passengers only between Providence and New York, and not to transport them to Boston. Be it so, that they are not absolutely bound. Yet they have a right to make a contract for this latter purpose, if they choose; and especially if

it will facilitate the transportation of passengers, and increase the patronage of their steamboats. I do not say, that they have a right to act oppressively in such cases. But, certainly, they may in good faith make such contracts, to promote their own, as well as the public interests.

The only real question, then, in the present case is, whether the conduct of the steamboat proprietors, has been reasonable and *bonâ fide*. They have entered into a contract, with the Citizens' line of coaches, to carry all their passengers to and from Boston. Is this contract reasonable in itself; and not designed to create an oppressive and mischievous monopoly? There is no pretence to say, that any passenger in the steamboat is bound to go to or from Boston in the Citizens' line. He may act as he pleases. It has been said by the learned counsel for the plaintiff, that free competition is best for the public. But that is not the question here. Men may reasonably differ from each other on that point. Neither is the question here, whether the contract with the Citizens' line was indispensable, or absolutely necessary, in order to ensure the carriage of the passengers to and from Boston. But the true question is, whether the contract is reasonable and proper in itself, and entered into with good faith, and not for the purpose of an oppressive monopoly. If the jury find the contract to be reasonable and proper in itself, and not oppressive, and they believe the purpose of Jencks in going on board was to accomplish the objects of his agency, and in violation of the reasonable regulations of the steamboat proprietors, then their verdict ought to be for the defendant; otherwise, to be for the plaintiff.

Webster for the plaintiff, then requested the Court to charge—That the jury must be satisfied, that this agreement was necessary or clearly expedient for the public interest, and the interest of the proprietors of the boats, or otherwise the captain of the boat could not enforce it, by refusing the plaintiff a passage:—

Or, that the defendant must show, that the substantial interest of the proprietors, or of the public, required an arrangement, such as that they entered into, in order to justify their refusal to carry the plaintiff for the cause assigned."

The Court refused to give instruction in the manner and form as prayed; but did instruct the jury, that it is not necessary for the defendant to prove, that the contract in the case was necessary to accomplish the objects therein stated; but it is sufficient, if it was entered into by the steamboat proprietors *bonâ fide* and purely for the purpose of their own interest, and the accommodation of the public, from their belief of its necessity, or its utility. If the jury should be of opinion, that under all the circumstances of the case, it was a reasonable contract, and the exclusion of the plaintiff was a reasonable and proper regulation, to carry it into effect on the part of the steamboat proprietors, then their verdict ought to be in favor of the defendant; otherwise, in favor of the plaintiff. Verdict for defendant.

Richard Taylor and Wife v. Martin Luther.

A general answer in Chancery overrules the pleas.

Where the plaintiff, in his Bill in Chancery, directly charged upon the defendant, that he had made and entered into a certain agreement, a simple denial by the defendant in his answer "*according to his recollection and belief*" is insufficient, and must be treated as a mere evasion.

There is nothing in the Statute of Frauds in Rhode Island (which is a copy of the English Statute, 29 Car. 2, ch. 3, § 4), rendering parol evidence inadmissible, to show, that an absolute deed was intended as a mortgage, and that the defeasance has been omitted or destroyed by fraud or mistake, or omitted by design, upon mutual confidence between the parties.

The grantors, in deeds of release and quitclaim, are competent witnesses to show, that their estate was not absolute, but a mortgage, of which their grantees had notice at the time of the conveyance to them.

Semble, that the grantor, as well as the grantee, if not otherwise interested, is a competent witness, to establish the original deed to be fraudulent.

There can be no proofs offered of matters not put in issue.

BILL in Equity to redeem premises asserted to be mortgaged, and for relief under the circumstances, there being no written declaration of a mortgage.

The bill alleged, that a certain conveyance of lands in Rhode Island originally made in October, 1821, by the plaintiffs in the right of the wife, to one Joseph Almey, and afterwards, in March, 1821, assigned by Almey, by a release and quitclaim, to one Josiah Westcott, and afterwards in January, 1826, by a like release and quitclaim, assigned by Westcott to the defendant, Martin Luther, and afterwards in January, 1826, mortgaged by Luther to the Central Bank in Rhode Island, for the sum of $500, was made to Almey upon mortgage as security for a debt due to him; although the conveyance purported on its face to be absolute, upon a parol agreement between the parties; that the assignments thereof were successively made to Westcott and Luther, with full knowledge thereof; and that the latter, on receiving the assignment to him, agreed to execute a written defeasance to this effect; and that the mortgage to the Central Bank was made with the consent of the plaintiffs, to discharge the prior incumbrances. The prayer of the Bill was to have a declaration, that Luther so held the premises in mortgage, and that the plaintiffs might be permitted to redeem the mortgage, or that Luther might be decreed to execute a written defeasance, so as to make the conveyance operate as a mortgage; and that the plaintiffs might have such other relief as the circumstances might require. No other person but Luther was made a party defendant to the Bill. The defendant put in three several and distinct pleas in bar to the suit, and then put in a general answer. The matter of these pleas in effect, was, that the original conveyance to Almey was absolute, and without any defeasance or written condition; and, that, without such defeasance

or written condition, under the Statutes of Rhode Island respecting conveyances, and frauds, and perjuries, there could not be any relief to the plaintiffs against the assignees. The cause now came on for argument, upon the whole merits, upon the pleadings, and answer and proofs in the cause, the general replication being put in to the answer.

Whipple, for the plaintiffs, cited 1 Powell on Mortg. Rand's edition, 121 *note;* 4 Kent Comm. 142–3 (2d edit.); *Roach* v. *Cosine*, 9 Wend. R. 227; *Reading* v. *Weston*, 9 Con. R. 120; *Brown* v. *Dean*, 3 Wend. R. 208; *Howell* v. *Price*, 1 P. Will. R. 291; *Floyer* v. *Lavington*, 1 P. Will. 271.

J. L. Tillinghast, for the defendant, cited, with regard to the difference between a trust to reconvey, and a mortgage, *Conway* v. *Alexander*, 7 Cranch R. 479; *Lloyd* v. *Inglis*, 1 Dessaussure R. 333; *Fitzpatrick* v. *Smith*, 1 Dessaussure R. 341; *St. John* v. *Benedict*, 16 Johns. Ch. R. 111. Parol evidence cannot extend or limit what is written, 1 Phillips Ev. 423, 448; *Countess of Rutland's case*, 5 Coke R. 26. A contract cannot rest partly in writing and partly in parol; *Parkhurst* v. *Van Courtlandt*, 1 Johns. Ch. R. 282; *Stackpole* v. *Arnold*, 11 Mass. R. 27; 4 Cranch R. 235; 2 Vesey, Jr. R. 243; 6 Ibid. 376; 7 Ibid. 211; 13 Ibid. 377; Schoales & Lefroy R. 36; 4 Brown Ch. R. 514.

Story J. Before proceeding to the merits of the cause it may be proper to say a few words on the pleas in bar put in by the defendant. I do not go into the particulars of these pleas, though I have no doubt, that they are all bad in substance, because, in the first place, in a Court of Equity, double pleading of this sort is not allowable; and in the next place, because the answer, not being special, and merely in support of the matter of the pleas, but being general, overrules the pleas, upon the settled doctrines of the Court. So, that the pleas may at once

be dismissed without further observation, and the cause must stand solely upon the bill, the answer, replication, and proofs in support of the averments on either side.

There is no doubt, that the defendant claims as assignee of the premises, under the releases and quitclaims stated in the Bill, and by his answer he expressly so admits. The defendant also, in his answer, expressly denies, that "*to his recollection or belief*" he did then and there, or ever make or enter into any agreement with Westcott or the plaintiffs or Almey, that the deed should operate as a mortgage, or that the premises should be redeemable upon the payment or raising of any sum of money, &c. as stated in the bill. Now, these matters being directly and expressly charged upon the defendant in the Bill, and so recent, it is not sufficient for him to deny the facts "according to his recollection or belief." To such allegations under such circumstances, he was bound to make a positive and direct denial; and a denial, according to his recollection or belief, must, under such circumstances, be treated in a Court of Equity as a mere evasion.[1] The defendant also denies, according "to his recollection or belief" (but in no other manner) notice of any such agreements with Almey and Westcott, as are set up in the bill. And I must say, that this does not appear to be a matter of mere inadvertence and mistake; but in the whole structure of the answer, there is a studied choice of phraseology to escape from any direct answer to the allegations in the bill, as to an agreement on his own part, or as to any parol agreements between the plaintiffs and Almey or Westcott, to cut down the absolute conveyance to a mere mortgage.

The defence, as asserted in the answer, (for to that only can the Court look, and not travel into other matters not contained in the bill or answer), is in substance, that the plaintiffs are not, upon their own shewing, entitled to maintain their bill, because

[1] See Harrison Ch. Pr. 181, 182. Coop. Eq. Plead. 314.

a parol agreement to turn a conveyance, which is absolute upon its face, into a mortgage, is utterly void, being contrary to the statute of frauds and perjuries, and the statute respecting conveyances in Rhode Island. If this defence fails, then it is further asserted, that there are no sufficient proofs in the cause to establish the existence of such a parol agreement.

Let us, in the first place, consider, how the case stands upon the matter of law. The statute of frauds and perjuries of Rhode Island (Digest of 1798, p. 473), is like the English statute of frauds and perjuries (Stat. 29 Car. 2, ch. 3, § 4), and requires every contract for the sale of lands to be in writing. But nothing is better settled than, that the true construction of this statute does not exclude the enforcement of parol agreements respecting the sale of lands in cases of fraud; for, as it has been very emphatically said, that would be to make a statute purposely made to prevent frauds, the veriest instrument of frauds.[1] The whole class of cases, in which Courts of Equity act in enforcing contracts for the sale of lands in cases of part performance, turns upon this general doctrine. It is laid down with great clearness and strength by my learned friend Mr. Chancellor *Kent*, in his Commentaries (vol. 4, 143), and he is fully borne out by the authorities, which he has cited (which I also have examined), and also by other authorities *in pari materiâ*. He states it thus: "A deed absolute upon the face of it, and though registered as a deed, will be valid and effectual as a mortgage, as between the parties, if it was intended by them to be merely a security for a debt. And this would be the case, though the defeasance was by an agreement resting in parol; for parol evidence is admissible to show, that an absolute deed was intended as a mortgage, and that the defeasance had been omitted or destroyed by fraud or mistake."[2] It is the same, if it be omitted

[1] See *Walker* v. *Walker*, 2 Atk. 100.

[2] See also *Pym* v. *Blackburn*, 3 Ves. jr. 38 note (a). 1 Powell on Mortg. 120, Rand's edition, note (2). *Walker* v. *Walker*, 2 Atk. 98, 99.

by design, upon mutual confidence between the parties; for the violation of such an agreement would be a fraud of the most flagrant kind, originating in an open breach of trust against conscience and justice. I do not comment upon this subject at large, because it seems to me wholly unnecessary, in the present state of the law, to do more, than to enunciate the principles, which govern cases of this nature, and which are as well established as any, which govern any branch of our jurisprudence. In the present case there is no pretence to say that Almey, or Westcott, or the defendant, have ever paid to the plaintiffs the full value of the land; and, indeed, the defendant does not himself assert it, as a distinct matter of defence. So that, if the facts are fully made out, and the plaintiffs are remediless, there will have been perpetrated a gross fraud and injustice upon the plaintiffs, and the defendant will reap the full reward of an iniquitous bargain on his side, obtained by meditated fraud and deceit. It is to be hoped, that the morals of a Court of Equity will at all times be found too strong, to suffer such injustice to go unredressed.

The other statute of Rhode Island, regulating conveyances of real estate (Digest of 1798, p. 263 to p. 269), provides in substance, that all conveyances of lands and all deeds of trust and mortgage whatsoever, hereafter executed, shall be void, unless they shall be acknowledged and recorded in the manner prescribed by the Act. But there is a proviso, that the same deed, between the parties and their heirs shall nevertheless be binding. This clause presupposes the conveyance to be in writing, and otherwise duly executed, except as to its acknowledgment and registration. It is intended for the protection of subsequent *bonâ fide* purchasers, for a valuable consideration without notice;

Sugden on Vendors (7th edit.), ch. 3, § 3, art. 3, p. 103. *Clarke* v. *Davis*, 2 Cowen R. 324. *Slee* v. *Manhattan Company*, 1 Paige R. 48. *Roach* v. *Cosine*, 9 Wend. R. 227. *Reading* v. *Weston*, 9 Conn. R. 120.

and it is difficult to perceive any application whatsoever, that it has to the case before the Court. It is not doubted or denied in this case, that if the present defendant were a *bonâ fide* purchaser, for a valuable consideration, without any notice of the trust or agreement set up in this case, he would be completely protected against the present claim.

There is another clause in the same statute, which provides, that, whenever any bond or defeasance or other instrument shall be executed, which shall cause any deed or other conveyance of lands to operate as a mortgage, or to pass an estate redeemable, such deed or instrument shall be recorded, and it shall not cause the deed, to which it relates, to operate as a mortgage, against any *bonâ fide* purchaser, without notice of the incumbrance. This clause admits of similar observations; and so far as it bears upon the present case, it demonstrates that notice of the incumbrance would deprive the party of his absolute title, and subject him to be deemed a mere mortgagee.

So that we may dismiss all farther consideration of the statutes set up in the defence; and proceed at once to the consideration of the facts of the case. And, here, the question is, in the first place, whether the original conveyance to Almey was intentionally designed, as between the parties, to be a mortgage; and if so, whether knowledge of the facts was brought home to Westcott, at the time of his purchase; and to Luther, at the time of his purchase. Now, neither Almey nor Westcott are made parties to the bill (as with great propriety they might have been); but their depositions have been taken as witnesses in the case, in behalf of the plaintiffs. And the first objection taken by the defendant is, to the competency of their testimony. It is said, that they are both grantors, directly or mediately to the defendant, and that as grantors, it is not competent for them to be witnesses, to show, that the estate in them was not absolute, but a mortgage, for that would be to contradict the nature and purport of their grants.

Now, in the first place, the deeds from Almey to Westcott, and from Westcott to the defendant, are mere releases of all the right, title and interest, that they respectively had at the date of their deeds, in the premises, without any covenant of any sort or kind whatsoever. It is the case, therefore, of a naked release of all the title, which the witnesses had in the premises, not warranting that they had any title whatsoever. And they are now called upon to establish, not that they had no title in the premises; but that they had a title in mortgage only, which they did convey to the defendant, and of which he had full notice at the time of the conveyance. I confess myself utterly unable to see, under such circumstances, what ground of incompetency exists against their testimony. They have no interest whatsoever; and they are not called upon to defeat the operation of their deed; but only to state what their right, title and interest in the premises was.

The ground of objection, which seems to be relied on, is, that the witness, *qua* grantor, is inadmissible. But I know of no such disqualification to such an extent. I understand, that in this country it has been settled in many States, contrary to the doctrine now established in England, that a party to a negotiable note or bill of exchange, shall not be admitted as a witness to show, that it was originally void. But even such a party is admissible, to establish any subsequent facts, not affecting its original validity, when he gave currency to it. But the same principle has not been applied to parties to instruments not negotiable, nor indeed to all negotiable instruments. On the contrary, in Massachusetts it has been held, that the rule (which in that State strictly excludes parties to negotiable notes and bills), has never been applied to parties to bills of lading;[1] or to parties to deeds,

[1] See *Brown* v. *Babcock*, 3 Mass. R. 29. *Hill* v. *Payson*, 3 Mass. R. 559.

who were not otherwise interested.[1] It has been upon this ground held, that the grantor as well as the grantee, if not otherwise interested, is a competent witness to establish the original deed to be fraudulent. This is a much stronger case, than the present; for it goes to establish the original invalidity of the deed, and that nothing passed by it from the grantor. But I am not aware, that the doctrine of these cases has been overturned; and though I do not wish now to decide the point, I confess, that I do not perceive any well-founded objection to it. But I have no doubt in the present case, that Almey and Westcott are competent witnesses. And if they are so, their testimony is quite decisive, to establish the merits of the plaintiff's case. There is, besides, a good deal of corroborative evidence; and it is by no means an insignificant circumstance, that the defendant claims a title merely by release; and that the consideration stated in the deed, falls so very far below that stated in the deed to Almey or Westcott, which by their own evidence was not the true consideration; and (as I have already said), it no where appears, that the value paid by the defendant for this release approached to the real value of a free and absolute title in the premises. On the contrary, the evidence establishes, that it is little more than a quarter part of the value.

The only doubt, that could be entertained in the present case, is upon the structure of the bill itself, alleging the mortgage to the Central Bank, but not making the corporation a party to the bill for a redemption and an account. It now appears, indeed, from the evidence on both sides, that that mortgage has been paid and discharged by the defendant, after an assignment thereof to some other persons; so that it is entirely extinguished. How it should have happened, that this most material fact should not

[1] *Inhabitants of Worcester* v. *Eaton*, 10 Mass. R. 368. *Hill* v. *Payson*, 3 Mass. R. 559. *Budge* v. *Eggleston*, 14 Mass. R. 245. *Laken* v. *Hayes*, 11 Mass. R. 498.

have found its way into the bill, as a dispensation from making the bank or its assignees parties thereto, I do not well understand. But, as it now in fact appears, that the mortgage is extinguished, and the defendant has not put any matter of defence upon this head, it does not seem to me impracticable, for the Court to grant the relief asked, without requiring an amendment of the bill in this particular.

In regard to the mortgages of the premises, by the defendant to Edmund S. Waldron, it is impossible for the Court judicially to take notice of them. There is no allegation in the bill or answer, that brings them before the Court; and the *probata* must be according to the *allegata*; or in other words, there can be no proofs offered of matters not put in issue. But there is another fatal objection in their way, if the technical difficulty could (which it cannot) be overcome. The first of these mortgages, given before the bill was filed, has been discharged. The second was given after the bill was filed, and *pendente lite*. So that neither can be properly available.

There must be a decree, declaring the premises to be redeemable, and the cause to be referred to a Master, to take an account on the footing of the conveyance, as a mortgage; and upon the coming in of the Master's report, a final decree will be made.

The following is a sketch of the decree, which was entered on the foregoing opinion.

This cause came on to be heard upon the bill and answer, and replication and evidence in the cause, &c. On consideration, &c., It is ordered, adjudged and decreed by the Court, that the said conveyance, by way of release and assignment of the premises, in the pleadings mentioned, to the said Martin Luther (the defendant), be and hereby is declared to be, not an absolute conveyance and assignment, but a mere mortgage of the premises to the said defendant, and as such, the plaintiffs are entitled to redeem the same, upon payment of all moneys and

just claims, which the said defendant hath secured to him by and in the same premises, in virtue of and under the same conveyance and assignment; and it is hereby decreed, that the plaintiffs be allowed so to redeem the same accordingly.

And it is further ordered, adjudged and decreed, that it be referred to a master for this purpose, to take an account in the premises, making all due allowances, and charging the defendant with all receipts and profits in the premises, with the usual powers of masters in such cases, to examine the parties, and to take other evidence in the premises, and to call for all proper vouchers and papers; and to make report of his doings in the premises.

And all further orders and decrees are reserved until the coming in of the Master's report.

Isaac Arnold v. Benjamin Clifford.

A promise to indemnify another for doing a private wrong, or committing a public crime, is against public policy, and is void in law. Therefore, a promise to indemnify the publisher of a libel is void.

The liberty of the press does not sanction the publication of libels.

This was an action on the case for a libel, by publishing, in April, 1835, in the Providence Republican Herald, a false and injurious account of the trial of a cause, in which the plaintiff was a party. There was a special plea in justification, and issue thereon.

At the trial, the principal question was, whether the publication contained a true, fair, and accurate account of the trial of the former cause; and it was argued by *Tillinghast* and *Webster* for the plaintiff, and by *Richard W. Greene* and *Whipple*, for the defendant. In the course of the trial, the question arose, whether, supposing the publication to be a libel, a promise, by

the defendant, to indemnify the publisher, was valid in point of law.

Story J. I have not the least doubt upon this point. A promise to indemnify another for doing a private wrong, or for committing a public crime, is against public policy, and is void in law. It is common learning, that among tort-feasors, who are knowingly such, there can be no contribution for damages recovered against any one of them, even although there be a promise of indemnity or contribution. *A fortiori*, the same doctrine applies to cases of indemnity for the commission of a public crime. No one ever imagined, that a promise to pay for the poisoning of another, was capable of being enforced in a court of justice. It is universally treated as illegal, it being against the first principles of justice, and morals, and religion. The man, who is hired to publish a libel against another, is guilty of an offence equally reprehensible in morals, though not so aggravated in its character; for the publication may not only be ruinous to the reputation of the individual aspersed; but may involve an innocent family in agonizing distress, and, perhaps, destroy its peace for ever. There is no such right recognised in civil society, or at least in our forms of government, as the right of slandering or calumniating another. The liberty of the press does not include the right to publish libels. Much less does it include the right to be indemnified against the just legal consequences of such publications.[1]

Verdict for the Plaintiff.

[1] See the case of *Colburn* v. *Patmore*, 1 Cromp. Mees. & Rosc. 73. S. C. 4 Tyrwhitt R. 677. *Pearson* v. *Skelton*, 1 Mees. & Wels. 504.

CIRCUIT COURT OF THE UNITED STATES.

Fall Circuit.

MASSACHUSETTS, OCTOBER TERM, 1835, AT BOSTON.

BEFORE { Hon. JOSEPH STORY, Associate Justice of the Supreme Court.
Hon. JOHN DAVIS, District Judge.

UNITED STATES *v.* JOHN BATTISTE.

The jury have not the right, though they may have the power, in rendering a general verdict, to determine the law in any case, civil or criminal. It is their duty to follow the law as laid down by the Court.

By the Statutes of the United States (1820, ch. 113, § 4), it is declared "that if any citizen, &c. shall, on any foreign shore, seize any negro or mulatto, *with intent to make such negro or mulatto a slave*, or shall decoy, or forcibly bring or *carry*, or shall receive such negro or mulatto on board of any such ship or vessel, *with intent as aforesaid*, such citizen or person shall be adjudged a pirate, and on conviction thereof, &c. shall suffer death." *Held*, that a person having no interest in or power over the negroes, so as to impress upon them the future character of slaves, and only employed in the transportation of them for hire from port to port, is not guilty under this Act.

It is not necessary, in order to bring the case within the Act, that the negroes should be free at the time of their seizure or reception on board.

"To make the negro a slave," in the sense of the Act, is to be the instrument or means of fixing on him that character for the future.

An African negro or mulatto, when bought on the coast of Africa by an

American citizen, or any person belonging to an American ship, ceases to be a slave, since no such person can, consistently with our laws, hold him in slavery.

INDICTMENT for a capital offence, in being engaged in the transportation of slaves, contrary to the fourth section of the Act of 15th May, 1820, ch. 113. Plea, Not guilty.

At the trial, the facts were substantially as follow: It appeared that Battiste sailed from New York, in July, 1834, in the brig *America*, a vessel belonging to the Messrs. Hathaway, Messrs. Swain, and Mr. Grinnell of New Bedford. The America was bound to St. Helena or a market, and sailed under the command of Captain Miller. The America did not touch at St. Helena, as was intended, on account of the unfavorable winds, but proceeded directly to the coast of Africa, and first touched at Loando, or St. Paul de Loando, the capital of the Portuguese possessions in this section of Africa,—a city of some extent, and with a population variously estimated from 3,000 to 18,000. Here the America remained about three weeks, when she sailed south to Nova Redondo, and finally New Benguela, or St. Phillippe. From this port she sailed to St. Helena, and after again touching at the ports above-mentioned, arrived at Nova Redondo, where for the first time she received on board twelve negro slaves as passengers.

These negroes were brought to the shore hand-cuffed, and chained together, attended by two negroes, a Portuguese, and a soldier. Their fetters were then taken off, and they were carried aboard the America, without making any resistance. The negroes were young, the youngest being about fourteen years of age. That afternoon they sailed for St. Phillippe, and arrived the next day between two and three o'clock. The harbor-master then came on board, and the usual custom-house regulations of the place were complied with. The slaves, with some goods, were landed the next morning in one of the boats of the

brig; the captain and mate going with them. The America then sailed south to Fish Bay, and returning to St. Phillippe and Nova Redondo, made some traffic, and procured a quantity of ivory. Thence she sailed to Old Benguela, where she took in fourteen negroes, who were also brought in irons to the shore, attended by a crowd of the natives, among whom was a king of the tribe. Battiste again assisted in removing the fetters, and receiving them on board the brig.

They left Benguela the same evening, and sailed for Loando, where the negroes were landed; Battiste and the captain being both present at the delivery. Remaining a fortnight at Loando, they next sailed to Old Benguela, where they took in wood and fowls; and thence to Nova Redondo for ivory. At St. Phillippe, where the brig next touched, they took in nineteen negroes, whom they received at the shore in irons; at Old Benguela, in the same manner they received twenty-one more negroes, in the month of December or January. On reaching Loando, they discharged this cargo in two or three boats; one of which went to the shore, and another was lost sight of among the Portuguese shipping in the harbor. All were delivered, with the exception of a little girl, taken in at Nova Redondo, who was afterwards brought by Captain Miller to New York, for which place the America sailed, after once more touching at each of the ports above-named.

The America took out the usual cargo, and sold it in the usual barter-trade for gum and ivory. The ports, at which she touched, are under the Portuguese jurisdiction, and Portuguese custom-house officers and soldiers were on board during the whole time of the brig's remaining in any port. The fact of receiving the negroes, at the times and places stated, was not denied; and it was not attempted to prove, that Battiste had aided or assisted in kidnapping, or *making* them slaves.

The case was argued by *J. Mills*, District Attorney for the United States, and by *D. Webster* and *C. P. Curtis* for the defendant. The points relied on by the counsel, will be found stated in the charge of the Court.

STORY J. in summing up to the jury, said; Before I proceed to the merits of this case, I wish to say a few words upon a point, suggested by the argument of the learned counsel for the prisoner, upon which I have had a decided opinion during my whole professional life. It is, that in criminal cases, and especially in capital cases, the jury are the judges of the law, as well as of the fact. My opinion is, that the jury are no more judges of the law in a capital or other criminal case, upon the plea of not guilty, than they are in every civil case, tried upon the general issue. In each of these cases, their verdict, when general, is necessarily compounded of law and of fact; and includes both. In each they must necessarily determine the law, as well as the fact. In each, they have the physical power to disregard the law, as laid down to them by the Court. But I deny, that, in any case, civil or criminal, they have the moral right to decide the law according to their own notions, or pleasure. On the contrary, I hold it the most sacred constitutional right of every party accused of a crime, that the jury should respond as to the facts, and the Court as to the law. It is the duty of the Court to instruct the jury as to the law; and it is the duty of the jury to follow the law, as it is laid down by the Court. This is the right of every citizen; and it is his only protection. If the jury were at liberty to settle the law for themselves, the effect would be, not only that the law itself would be most uncertain, from the different views, which different juries might take of it; but in case of error, there would be no remedy or redress by the injured party; for the Court would not have any right to review the law, as it had been settled by the jury. Indeed, it would be almost impracticable to ascertain, what the law, as settled by the

jury, actually was. On the contrary, if the Court should err, in laying down the law to the jury, there is an adequate remedy for the injured party, by a motion for a new trial, or a writ of error, as the nature of the jurisdiction of the particular Court may require. Every person accused as a criminal has a right to be tried according to the law of the land, the fixed law of the land; and not by the law as a jury may understand it, or choose, from wantonness, or ignorance, or accidental mistake, to interpret it. If I thought, that the jury were the proper judges of the law in criminal cases, I should hold it my duty to abstain from the responsibility of stating the law to them upon any such trial. But believing, as I do, that every citizen has a right to be tried by the law, and according to the law; that it is his privilege and truest shield against oppression and wrong; I feel it my duty to state my views fully and openly on the present occasion. It is not, indeed, an occasion, on which there is any reason to doubt, that an intelligent jury can understand the principles of law applicable to the subject, as well as the Court; for they are the principles of common sense. And as little reason is there, in my view, to suppose, that they can operate injuriously to the real merits of the case of the prisoner.

There is no question of fact really in dispute between the parties, except the intent of the prisoner. The admitted facts are, that the prisoner was mate of the brig America, belonging to citizens of the United States, on her late voyage to the coast of Africa. The voyage, as planned by the owners, was a lawful voyage. At one or more places in the Province of Angola, one of the Portuguese possessions on the coast of Africa, certain negroes were, by the order of the master of the brig (Capt. Miller) taken on board as passengers, with the assistance of Battiste, and carried to other places within the Portuguese possessions on the same coast. These negroes were carried for hire, and a certain rate of passage money; and were landed and delivered to their respective owners at the places of destination.

Neither the owners nor master of the brig, nor Battiste, nor any of the crew, had any interest or property in these negroes, or in the sale of them. They did not co-operate in making them slaves, or in perpetuating their state of slavery, unless the mere transportation of them, as above-mentioned, is to be deemed such an act.

Under these circumstances, the question for the jury to decide is, whether such a transportation of these negroes is a capital offence, within the true intent of the act of the 15th of May, 1820, ch. 113. The question is not, whether the defendant is guilty of an offence against some law of the United States; but whether he is guilty of the very offence charged in the indictment. I have no doubt, that he is guilty of a misdemeanor under the second section of the act of the 10th of May, 1800, ch. 51, as that act has been construed by the Supreme Court of the United States.[1] But that is unimportant to be considered on the present occasion.

The words of the act of 1820, ch. 113, sect. 4, on which the present indictment is framed, are as follow: "That if any citizen, &c. &c. or any person whatever, being of the crew or ship's company of any ship or vessel, owned in whole or in part, or navigated for, or in behalf of any citizen or citizens of the United States, shall land from any such ship or vessel, and on any foreign shore, seize any negro or mulatto, not held to service or labor by the laws of either of the States or Territories, with intent *to make* such negro or mulatto a slave; or shall decoy, or forcibly bring or carry, or shall receive such negro or mulatto, on board of any such ship or vessel, with intent as aforesaid, such citizen or person shall be adjudged a pirate, and on conviction thereof, &c. shall suffer death."

The language of this section is peculiar. In no other act is

[1] See The *Mexico*, 9 Wheaton R. 403 to 406.

the phrase found "to *make* such negro, &c. a slave."[1] And the first question, which arises, is, what did Congress mean by the words "to make a slave." It is the intent to make a slave, which constitutes the essence of the offence; for neither the seizing, nor forcibly bringing, or carrying, or receiving a negro on board, is any offence without such superadded intent.

It is argued by the learned counsel for the prisoner, that in order to bring the case within the purview of the act, it is indispensable, that the negro should, previously to the seizing or carrying him on board, have been free; for if he were not previously free, the party could in no just sense be said to intend to make him a slave. The *onus probandi* would, under such circumstances, be on the government to establish the fact of the negro being free; and, if he was already a slave, then the case was not within the act.

To this interpretation of the act I cannot yield my assent. If it be well founded, the act becomes a mere nullity; and as useless an instance of inefficient legislation, as could well have been devised. It might as well be blotted out of the statute book. Congress, in passing the act, must be presumed to have been well acquainted with the nature and course of the slave trade. The known intention of all our statutes on this subject is to prohibit the traffic in African slaves, however carried on, or in other words, to suppress the slave trade on the coast of Africa. Now, by the very course of this trade, it would be almost a moral impossibility to trace out the origin, nativity, or antecedent political state of any negroes found on the coast of Africa, in the hands of the slave dealers. The negroes themselves, in regard to whom the offence should be committed, might, and ordinarily would, be transported to some other for-

[1] See the Act of 10th of May, 1800, ch. 51. Act of 2d of March, 1807 ch. 77. Act of 20th of April, 1818, ch. 86. Act of 3d of March, 1819, ch. 224.

eign country without any possible means of ascertaining their identity, or of obtaining evidence as to their previous condition, long before any prosecution could take place. In truth, the mass of all the negroes bought and sold on the coast would be found, *de facto*, in a state of slavery; and to punish the traffic, only when it took place by proof of the sale, or carrying away of free negroes, would be to establish a prohibition in mere mockery of the avowed objects of public justice. If Congress intended *bonâ fide* to suppress the slave trade, they must have intended to suppress the traffic in slaves, as well as in free negroes on the coast. They must have intended to cut off that, which was the common and usual trade; that, which was in its own nature capable of proof; and not such an offence, as if it existed, could scarcely admit of clear proof; or if proved, would have no real tendency to suppress the traffic.

One or two instances may be put to illustrate these suggestions. According to the argument, if an American ship should be employed in kidnapping and stealing slaves on the coast of Africa from their lawful masters, and the officers of such ship should forcibly carry them to another foreign country, and there sell them as slaves, it would not be an offence within the act. So, if an American ship should be employed in buying slaves, and carrying them to another foreign country, with an intent to sell them there as slaves; and the officers of the ship should actually sell them in such foreign country as slaves; it would also be no offence within the act. Now, I cannot but think, that these cases must have been precisely such as were within the contemplation of the very prohibition of the Act of Congress. If they were not, the Act would be but an empty sound, and a mere nullity, in a practical sense. The construction, contended for, ought not, then, to be adopted, unless it be the natural or necessary interpretation of the words. If there be another interpretation, equally natural and perfectly consistent with the words, and carrying into effect the apparent intent of the Act, that ought to be adopted in furtherance of public justice.

My opinion is, that the language used, taking the whole context, requires a different interpretation from that assumed in the argument, an interpretation reasonable in itself, and, as I think, also, the true interpretation of the words.

The words used are, if any person, &c. shall seize, &c. any negro or mulatto. No descriptive or qualifying words are added as to the character or condition of the negro or mulatto, whether free or enslaved; and consequently, the words being general, apply to all negroes and mulattoes, whether free or slaves. The public mischief is the same, whether the negro, &c. be a slave, or be free. In each case the slave trade is carried on; in each case it is equally important to have it suppressed. In each case the known public policy of the United States has been to suppress it.

In the next place there is an exception from the words, which demonstrates it to have been the intention of Congress to include negroes, who are slaves, as well as negroes who are free, within the clause. The exception is of negroes or mulattoes, "held to service or labor by the laws of either of the States or Territories of the United States." No one will doubt, that this exception was designed to exclude from the operation of the clause, slaves held to labor in the United States. An exception is always construed to exclude something otherwise within the purview of the enacting clause. The exception would have been wholly useless, if the words "negro or mulatto" would not, in their ordinary meaning, have included slaves. It being made, the legislature must be presumed to have intended to include all other slaves, than those within the exception, within the general words, negro or mulatto.

My construction of the act is this. It intended to punish, as a capital offence, the decoying or forcibly bringing or carrying or receiving on board any negro or mulatto, with intent on the part of the party, decoying, bringing, carrying or receiving, to make such negro or mulatto a slave in future, without any reference

whatsoever to his antecedent state or condition, whether a slave or free. The act refers, not to any past state or condition, but to the intent of the party in future, viz. to make the negro or mulatto a slave. The offence consists, then, not merely in the fact of having originally impressed upon the negro or mulatto the character of a slave; but in impressing or continuing it for the future. "To make the negro a slave" in the sense of the Act, is to be the instrument or means of fixing on him that character in future. If the words of the Act had been, with intent to make the negro or mulatto an apprentice for life or for years, instead of to make him a slave, it seems to me, that there would be little difficulty in construing the Act to refer to a future state, to be given or impressed by the party himself, rather than to any past state, whether bond or free. The moment an African negro or mulatto is bought on the coast of Africa by an American citizen, or by any person belonging to an American ship, he ceases to be a slave; for no American can, consistently with our laws, hold him in slavery. And if he bought him with an intent to hold or sell him as a slave thereafter, and received him on board for the purpose of so making him a slave, that would bring the party within the prohibition of the Act. My opinion, therefore, is, that to convict the prisoner upon the present indictment, it is indispensable to show, that he had some title or interest in or power over the negroes in question, so as to be able to impress upon them by his own act the character of slaves in future, and that he intended so to do. If he had no title or interest in these slaves, and no such power over them; but he was merely employed in the transportation of them for hire by the owners of them from one port to another port of the Portuguese possessions, then (although it is an offence under our laws) he is not guilty of the offence charged in the indictment, even if such owners of the slaves intended to keep them in slavery in future.

My reasons for this opinion may be shortly given. These

are provinces or possessions on the African coast belonging to the Portuguese government, and under the regular administration of Portuguese authorities duly established there. We all know, that domestic slavery is established or at least recognised as a legitimate state in the Portuguese provinces and possessions. These negroes, being (as is supposed) slaves, were transported from one province or possession to another province or possession of the same sovereignty. And if such a transportation of slaves be, under the Act of 1820, a capital offence, then it would be equally a capital offence under the same Act for an American ship to transport a Spanish merchant with his domestic slaves, merely as passengers for hire, from one port of the Island of Cuba to another; as, for instance, from Matanzas to Havanna. The cases are exactly parallel. Now, it seems to me impossible to believe, that Congress could have intended to punish capitally, as a piracy, such an act as the mere transportation of slaves from one port to another of the same country. It would confound all moral distinctions in regard to crimes. It would punish an act involving not the slightest moral turpitude, in the same manner, as it would punish the hardened atrocity, inhumanity, and horrible iniquities attending the slave trade on the coast of Africa. It would strike us all with astonishment, that Congress should make the mere transportation of a negro slave, as a passenger for hire, from one port to another of the same country, an offence of equal enormity with kidnapping or stealing negroes on a foreign coast, and selling them to perpetual bondage in another foreign country. If we could strip the present case of the associations connected with its localities on the coast of Africa, where we know the slave trade exists with all its unnumbered horrors, there would be no difficulty in believing, that the mere act of transporting slaves, as passengers for hire, without any interest or title in them, and without any intention to fix upon them, by any personal act, the state of future slavery, could not be the offence intended by the Act of Congress. The

transportation of slaves for hire, from one port to another of the Portuguese settlements on the coast of Africa, though it may there facilitate the operations of the slave dealer, is not in substance a different case from transporting the same slaves from one port to another in the Brazils or in Portugal.

There is another consideration, not wholly without weight in this cause. In the other acts against the slave trade, the transportation of slaves from the coast of Africa, and from one foreign country to another, is in express terms prohibited.[1] If the Legislature had intended to increase the punishment, and to make the mere transportation of slaves a capital offence, it would be natural to expect, in the present Act, some language significant of that intent, like that found in the former Acts. The very omission, therefore, of the appropriate phraseology, furnishes a presumption, that the Legislature had some other and different offence in their view.

Mem. After this charge the jury found a verdict of not guilty for the prisoner. He was afterwards indicted on the second section of the Act of 1800, ch. 51, and was admitted to plead *nolo contendere*; and thereupon he received sentence for the offence.

William Briggs, in Equity *v.* Arthur French.

A conveyance had been made of certain lands, on the 7th of May, 1829. Before it could be properly recorded, the defendant attached these lands, to secure a note signed by the grantors, on the 8th of May, 1829, the day following the execution of the conveyance, and payable in thirty days, but which was ante-dated, as of the 3d April preceding, being the time when the goods, which formed the consideration of it, had been sold on a

[1] See Act of 1800, ch. 51, § 2. Act of 1807, ch. 77, § 4. Act of 1818, ch. 86, § 4.

credit of six months. *Held*, that the ante-dating the note, and creating a present debt, on which the attachment of the lands was made, was a fraud upon the grantees, and did not disturb their rights under the conveyance, whatever might be the validity of the proceeding, as between the parties.

A conveyance, which purports to be *bonâ fide*, and for a valuable consideration, will be taken to be so, until the contrary is shown.

A conveyance made by a citizen of one State, to a citizen of another State, for the purpose of enabling the latter, to maintain a suit on it, in a Court of the United States, vests a legal title as between the parties; and a stranger, not claiming under either of the parties, has no right to inquire into the motive of the conveyance. *Quære*, if the grantee would hold his title subject to the equities it had in the hands of the grantor.

If a citizen removes from one State to another, in order to prosecute suits in the Courts of the United States, provided the removal be real, the motive of the act cannot be inquired into.

The Judiciary Act of 1789, ch. 20, § 11, contains the following exception; "Nor shall any District or Circuit Court have cognizance of any suit, to recover the contents of any promissory note, or other chose in action, in favor of an assignee, unless a suit might have been prosecuted in such Court to recover the said contents, if no assignment had been made, except in cases of bills of exchange;" *Held* that this does not apply, either directly or constructively, to a conveyance of lands from a citizen of one State to a citizen of another State.

Quære, as to the authority of the cases, *Maxwell's Lessee* v. *Levy*, (2 Dall. R. 381, S. C. 4 Dall. R. 330) and *Hurst's Lessee* v. *McNeil* (1 Wash. C. C. R. 70, 83).

Quære, if an attachment by a creditor will overreach the title of a prior grantee from the debtor, unless he has been guilty of laches, in recording his deed? If he records it within a reasonable time, can it be defeated by an intermediate attachment?

Quære. Where a conveyance is made by one partner of his separate property to his private creditor, can a creditor of the firm, by an attachment laid before the deed of conveyance is recorded, defeat the prior title of such private creditor? If he may at law, can he in equity?

Quære, as to the effect, both in law and equity, of an attachment made after the execution of a *bonâ fide* conveyance and before the recording of it.

BILL in Equity. The bill set out a fraudulent attachment, and levy of the defendant, by a contrivance with his debtor, upon land sold by the latter to the plaintiff, situate in New Hampshire, before the deed of conveyance to the plaintiff was recorded, and charged the defendant with full notice of all the facts. The bill

prayed, that the defendant might, by injunction, be restrained from selling or conveying the land; that the levy might be declared fraudulent; that the defendant might release his claim with warranty against all acts done by him; and that the plaintiff might be quieted in his present possession of the premises. A demurrer to the bill for want of equity was overruled at a former term. (S. C. 1 Sumner R. 504).

At this term, the cause was heard on the bill and answer and proofs in the case. The material facts appear in the opinion of the Court. *J. Mason* for the plaintiff; and *Aylwin* for the defendant.

STORY J. delivered the opinion of the Court to the following effect. The defendant claims title to the land in controversy under a levy on an execution, duly issued on a judgment rendered after an attachment of the land upon *mesne* process. The title of the plaintiff is under a conveyance previously made by George A. Hodges to Jonathan Hodges and others, of the same land. The conveyance was made in Boston; and before it could be put on record in the Registry of Deeds for the county of Sullivan, in the State of New Hampshire (where the land lies), although due diligence was used for this purpose, the defendant had made his attachment.

The first question is, whether the defendant had, at the time of making his attachment, notice of the conveyance of the same land so made to Jonathan Hodges and others. My opinion is, that the evidence establishes this fact beyond reasonable controversy. Although the defendant's answer is evasive and unsatisfactory in its form, yet it admits enough of knowledge of the conveyance, to have put the party upon further inquiry. He knew the fact of an assignment having been made by G. A. Hodges, upon his failure, to Jonathan Hodges and others (the grantees) for the benefit of themselves and other creditors; and he actually summoned them as trustees in a trustee process, before he made any attachment. Now, that assignment conveyed

these very lands. But, if it were doubtful upon the answer, the fact of actual notice of the conveyance is abundantly made out, by the whole current of the evidence, so strongly and so clearly, that it seems to me impossible to escape from it.

But if this objection to the defendant's levy were not (as I think it is) absolutely insuperable, there is another fact equally decisive against it. It is, that, there was no debt actually due to the defendant at the time of the conveyance, upon which any suit could be maintained. The defendant had sold goods to G. A. Hodges and Company, on the third day of April, 1829, upon a credit of six months. The note, for these goods, upon which the suit was brought, and the attachment laid, was given on the 8th of May following, after the conveyance to Jonathan Hodges and others, was executed; and the note was ante-dated, as of the 3d of the preceding April, so as to give it the appearance of being contemporaneous with the sale of the goods. Now, whatever might be the validity of this proceeding between the parties, it is perfectly clear, that it could have no legal operation to disturb the rights of the grantees under the conveyance to them. It would be a fraud upon them to ante-date a note, and create a present debt to defeat the rights antecedently acquired by them under that conveyance. So that, in both views, the levy of the defendant must, as to these grantees, and all persons claiming under them, be treated as utterly void and inoperative.

But it is said, that the conveyance was made to the present plaintiff solely with a view to give jurisdiction to this Court, and if so, that it is utterly void, and the present bill must be dismissed. *Primâ facie*, the conveyance must be taken to be, what it purports to be, a conveyance *bonâ fide*, and for a valuable consideration. And the burthen of proof is upon the defendant, who sets it up as a matter of defence, to establish the contrary fact, for which he contends. Now, there is a total absence of any such proof in the cause; and there is positive proof, that the

conveyance to Lovel and Delano, under whom the plaintiff claims title, was for a full consideration. The defence then, fails for the want of any suitable proofs.

But I take this occasion to say, that I am by no means prepared to admit the doctrine, which this point of the defence supposes. I am yet to learn, that a conveyance made by a party to a citizen of another State, for the purpose of enabling the latter to maintain a suit on it in a Court of the United States, is not in point of law operative to pass the legal title between the parties. I know of no law, that prohibits such a conveyance, or declares it inoperative. Nor do I well understand, how a mere stranger to the title, not claiming under either of the parties, has a right to inquire into the motive of such a conveyance. The most, it seems to me, that can arise from establishing a conveyance to be of this sort, is to throw back the plaintiff upon the same equities, which would have applied to the title in the hands of his grantor. But I cannot perceive, how it defeats the legal estate vested in him by the conveyance. He may hold the legal estate as trustee for the grantor; but, that does not affect the legal validity of the conveyance. Any man has a right to convey his estate in trust for himself, unless such trust be prohibited by law. I know of no such law applicable to a case of this sort.

It is every day's practice for a citizen of one State to remove to another State, to become a citizen of the latter, in order to enable him to prosecute suits and assert interests in the Courts of the United States. And, provided the removal be real and not merely nominal; and he has truly become a citizen of another State, I have never understood, that his motive for the act is inquirable into; or, if his motive is to prosecute a suit in the Courts of the United States, that such a motive would defeat his right so to sue. It might be a circumstance to call in question the *bona fides* and reality of the removal or change of domicil. But if the new citizenship is really and truly acquired, his right

to sue is a legitimate, constitutional and legal consequence, not to be impeached by the motive of his removal. But it is said, that such a conveyance is a fraud upon and an evasion of the laws of the United States. Of what laws? I know of no law of the United States, which declares such a conveyance void, or in the slightest manner alludes to it. The Constitution declares, that the judicial power of the United States shall extend to "controversies" between citizens of different States. The moment such a conveyance is made, if the legal title passes, there does exist a "controversy" between the grantee, and any adverse claimant, who is a citizen of another State to which the terms apply. The Judiciary Act of 1789, ch. 20, § 11, declares, that the Circuit Courts shall have jurisdiction, among other things, of "suits" between a citizen of the State, where the suit is brought, and a citizen of another State. Now, the present suit precisely answers that description. The plaintiff is *bonâ fide* a citizen of New Hampshire, and the defendant is *bonâ fide* a citizen of Massachusetts; and they have a "controversy" with each other founded upon adverse legal rights, and upon equities attached thereto.

But it is said, that the conveyance is an evasion of the laws of the United States, because, in the 11th section of the Judiciary Act, of 1789, ch. 20, there is an express exception in these words; "Nor shall any District or Circuit Court have cognizance of any suit to recover the contents of any promissory note or other chose in action in favor of an assignee, unless a suit might have been prosecuted in such Court, to recover the said contents, if no assignment had been made, except in cases of foreign bills of exchange"; and that the present case falls within the equity of this exception. That is begging the whole question. The exception itself supposes, that, but for the provision, such notes and choses in action might have been sued by any assignee in the Courts of the United States. It excepts, then, from the general words of the section such cases, and such cases only,

as fall within the exception; leaving all others within the ordinary operation of the enacting clause. Now, the exception extends to promissory notes and choses in action. The present suit is not founded upon either. It is founded upon a conveyance of a title to land, good (as far as appears) by the *lex loci situs*. The laws of New Hampshire no where condemn, prohibit, or repudiate such a conveyance, either directly or constructively. The words, then, of the exception do not apply to the case. It is a case within the general descriptive words as to suitors, founding the jurisdiction of the Circuit Court. The section, not having prohibited all assignments, but only assignments of notes, and choses in action, by implication, leaves all other assignments operative. *Exceptio probat regulam.* Congress might doubtless have prohibited the Circuit Courts from taking jurisdiction in cases of this sort, if they had chosen so to do. What they might do is one thing; what they have done is quite another. Until there is some act of Congress shown, which prohibits a suit of this sort, between citizens of different States, I do not well see, how it is to be treated as an evasion of the laws of the United States, because other cases are prohibited. I know of no right of the Courts of justice of the Union to create exceptions to their own jurisdiction, which the acts of Congress have not created. We are not at liberty to extend exceptions beyond the ordinary reasonable meaning of the terms of a law, upon any rational equities, not included in these terms.

The cases of *Maxwell's Lessee* v. *Levy* (2 Dall. R. 381, and more fully reported in 4 Dall. R. 330), has been much pressed upon the Court, as directly in point in support of this objection to the jurisdiction. It is so; but with the greatest deference to the learned Judge (Mr. Justice Iredell) who decided that case, I am unable to accede to it. The reasoning in that case is wholly unsatisfactory to my mind. It assumes, throughout, the very matter in controversy; and I cannot but think it was

founded in an extreme jealousy of the jurisdiction of the Courts of the United States, and an extreme solicitude not to interfere with the State jurisdiction. It assumes, that there was no controversy between the parties before the Court, (who were citizens of different States) because one party was a trustee of the land, upon a conveyance executed by the grantor, for his own benefit, and the special purpose of giving jurisdiction to the Circuit Court. It assumes, that such a conveyance is utterly void, or (to use the words of the learned Judge) because "the law cannot, without absurdity, permit a man to create a trust for the purpose of defeating a solemn provision of its own." Certainly not. But then we must first see, that such a solemn provision of law is violated. Now, the constitution has no where defined, what shall be the nature of the "controversies," to which the right of suing in the courts of the United States shall attach. The words are general, and include all "controversies," of every nature between citizens of different States. The Judiciary Act of 1789, ch. 20, s. 11, is equally general. The section applies to all suits between the citizens of different States therein referred to, which suits are not within the exception. A controversy may exist between parties claiming adversely to each other, whether the title be legal or equitable, *bonâ fide* or *malâ fide*. It is sufficient, if there be a title set up by one in opposition to the other. Nay, a controversy and a suit may exist between citizens of different States, where one party in the event may turn out not to have had any title at all, at the commencement of the suit. But this is not a question to the jurisdiction; but upon the merits of the controversy. The jurisdiction flows from the citizenship of the parties. The right to recover flows from the sufficiency of the title; and that is matter purposely to be discussed upon the trial of the merits. Take the very case then before the Court. Suppose the defendant, in that suit, insisting upon his better right to the lands in controversy, had brought a suit in the Circuit Court at law or in

equity, against the plaintiff, to set aside or defeat the title of the plaintiff under the conveyance from his grantor; would it for a moment be contended, that the plaintiff could—by setting up the objection, that the title under the conveyance to him was to found a jurisdiction in the courts of the United States, or that the conveyance was utterly void—defeat the suit so commenced against him in the Circuit Court? And if such an objection could not be maintainable in the converse case, what difference could it make, as a matter of "controversy" or "suit," to found jurisdiction, that the parties were reversed on the Record? I confess, that I do not well see. The case manifestly proceeded upon the supposition, that the right to maintain a suit in the courts of the United States does not depend upon the citizenship of the parties; but upon the nature and validity of the titles, which they respectively assert in the suit. It appears to me, that such a doctrine is wholly unmaintainable. Besides; the case supposes, that the conveyance to the plaintiff, for the purpose of founding the jurisdiction, was utterly void at law. Now, this was a matter to be proved, and as yet I have seen no evidence, that by the principles of local law, or general jurisprudence, such a doctrine is established. And, if it were established, it would go to show, that the plaintiff had no merits to sustain his suit; but not, that the Court had not jurisdiction to hear and decide upon the merits. There would still be a "controversy," and a "suit" between the parties, although the right might be altogether on one side.

In the case of *Hurst's Lessee* v. *McNeil* (1 Wash. Cir. C. Rep. 70, 83), the point arose incidentally upon the trial of the merits of the cause by a jury, and not upon any question to the jurisdiction. The Court seem to have thought, that a deed executed, in order to give jurisdiction to the Court, was a mere fictitious thing, not to be countenanced. But no reasons were given for this opinion; but a mere dry statement of it as law. With all deference to the great judge, who delivered that opin-

ion, I cannot assent to that doctrine; and I should require some stringent authorities to support it.

I have thrown out these suggestions, lest it should be supposed, that this Court acquiesces in the doctrine of the cases in the Pennsylvania Circuit Court. Whenever the question shall be the turning point of a cause in this court, I, for one, shall deem it a very fit one for argument, upon original principles.[1]

The view, which I have taken upon the foregoing points of notice, of the defendant's debt not being due, and of the conveyance to the plaintiff not being shown to be collusive, or designed to give jurisdiction to the Court, renders it unnecessary to consider several other points, which are presented by the accompanying facts. In the first place, there is a very grave question presented, whether an attachment by a creditor can be permitted to overreach the title of a prior grantee from the debtor, unless he has been guilty of laches in recording his deed? If he records it as soon as he possibly or reasonably may, can it be defeated by the attachment of a creditor made in the intermediate time? In the next place, where a conveyance is made by one partner, of his separate property, to his own private creditor, can a mere creditor of the firm, by an attachment laid before the deed of conveyance is recorded, defeat the prior title of such private creditor? If he may at law, can he in Equity, where, generally, the creditors of one partner are allowed a priority of payment out of his private property, and the creditors of the partnership a priority of payment out of the partnership property? In the next place, can a creditor, in any case, by an attachment made after the execution of a *bonâ fide* conveyance by his debtor, of any real property, hold that property against the grantee, if the deed of conveyance is not recorded until after the attachment? Or does such creditor, by such an attachment, take only the interest, which the debtor him-

[1] See *Harrington v. Long*, 2 Mylne & Keen R. 592, 593.

self could claim in such property? If the creditor could hold the property under such attachment and levy, at law, can he hold it in equity, against the grantee?

These are questions, on which I give no opinion. The plaintiff is entitled to a decree in his favor, upon the merits, for a reconveyance of land taken under the levy, and to a perpetual injunction.

The decree was in the following terms:

This cause came on to be heard at this term upon the Bill and Answer, and the evidence in the case, and was argued by counsel. In consideration thereof it is ordered, adjudged, and decreed by the Court, that the said levy on the land in the said Charlestown in the pleadings mentioned, being made with full notice of the title of the plaintiff in the bill mentioned, the title thereto is a fraud upon the plaintiff; and therefore is to be held utterly void; and the Court do declare the same accordingly. And it is further ordered, adjudged and decreed by the Court, that the said defendant, his heirs and assigns, be perpetually enjoined not to set up or assert any title thereto against the said plaintiff, his heirs and assigns, under the said levy; and that the said defendant do execute, in due form of law, within thirty days from the entering of this decree, a deed of release of all his right and title under the said levy to the said plaintiff, his heirs and assigns, in such form as shall be settled by Theophilus Parsons, Esq. one of the Masters in Chancery of this Court, and that the plaintiff recover his costs.

CIRCUIT COURT OF THE UNITED STATES.

Fall Circuit.

RHODE ISLAND, NOVEMBER TERM, 1835, AT PROVIDENCE.

BEFORE { Hon. JOSEPH STORY, Associate Justice of the Supreme Court.
Hon. JOHN PITMAN, District Judge.

JOHN H. CLARKE, ADMINISTRATOR OF WILLIAM W. WETMORE,

v.

HENRY MATTHEWSON AND OTHERS.

The Circuit Court of the United States cannot entertain a bill of revivor, where the controversy, which it seeks to revive, is now between citizens of the same State, though the parties to the original bill, were citizens of different States. As where a bill of revivor was brought by an administrator, who was a citizen of the same State with the defendant, though his intestate was of a different State.

Where the parties are citizens of different States, at the commencement of the suit, a subsequent change of domicil and citizenship will not oust the jurisdiction.

THIS was the case of a bill of revivor, brought by Clarke as administrator of William W. Wetmore deceased, to revive a suit in equity, brought by Wetmore in his lifetime, against the defendant Henry Matthewson. The bill of revivor stated, that the present plaintiff, John H. Clarke, was a citizen of Rhode Island; that his intestate, W. W. Wetmore, was a citizen of Connecticut, and on the 22d of February, 1830, filed his original

bill against Matthewson and others, all citizens of Rhode Island, in which bill, praying an account, &c. That the defendants appeared and answered the bill; that the cause was afterwards at issue; and at November Term, 1831, it was referred to a Master, to take an account, &c; and, that afterwards and before any report was made, viz. in 1834, the said W. W. Wetmore died, whereby the suit became abated. That the present plaintiff had taken administration of his estate in the State of Rhode Island; and he therefore prayed, that the suit might stand revived, and be put in the same state and condition, as the same was, previous to the death of the said W. W. Wetmore.

A motion was now made, by *Tillinghast* and *D. Webster*, for the defendants to dismiss the bill of revivor, upon the ground, that the plaintiff and defendants were all citizens of the same State; and, that the plaintiff suing as administrator, made no difference in the case.

Whipple and *R. W. Greene*, for the plaintiff, *e contra*, contended, that the Court had jurisdiction, because it was not the case of an original bill, but a mere bill of revivor of a suit, originally brought between citizens of different States.

Story J. If this were the case of an original bill, brought by the plaintiff, as administrator, against the defendants, it is clear, that the suit could not be maintained, although the plaintiff's intestate was a citizen of another State; for the parties before the Court would be all citizens of Rhode Island. The plaintiff's suing *in autre droit* could not help him, although his intestate was a citizen of Connecticut; for the suit would still be his own personal suit. This is the necessary result of the doctrine, maintained in *Chappedelaine* v. *Decheneaux*, 4 Cranch R. 306, *Childress* v. *Emery*, 8 Wheat. R. 642, and *Dodge* v. *Perkins*, 4 Mason R. 435. But the present bill being a bill of revivor only of an original suit, between citizens of different States, it is supposed, that the plaintiff is entitled to revive and continue

the former suit, although he is a citizen of the same State as the defendants. The difficulty upon this is, that the moment the suit stands revived, it is in reality a suit between the plaintiff and the defendants personally; and the decree must treat them as the only parties to the bill. The death of the original plaintiff severed him for ever from the suit.

This is not like the case of a bill, brought for an injunction to a judgment of the Circuit Court. There it has been held, that if the plaintiff in the judgment is a citizen of another State, than that in which the suit is brought, he may still be compelled to appear and answer the injunction bill. But the reason is, that the Judiciary Act of 1789, ch. 20, sect. 11, requiring the suit to be brought in the district, of which the defendant is an inhabitant, or in which he is found, does not apply to any bill, but an *original* bill; and an injunction bill is treated not as an original, but as an incidental bill. The same rule applies to a cross bill, filed in the same Circuit Court, where the original bill is brought. In each of these cases, the difficulty does not arise from the constitution, but from the act of Congress. The constitution would justify a suit between citizens of different States in any Circuit Court. The act of Congress narrows it down to the Circuit Court of the district, where the defendant dwells, or is found.

In the cases of injunction bills and cross bills, the parties are supposed still to be citizens of different States; and therefore, the only difficulty, that arises, is, as to the service of process on them. But, in the present case, the bill of revivor seeks to carry on a suit between adverse parties, who are all citizens of the same State. When the suit is revived, it is a suit by Clarke, a citizen of Rhode Island, against Matthewson and others, citizens of Rhode Island. I confess, that I have difficulty in seeing, how this Court can entertain such a suit, or make any decree therein; for the controversy is no longer between the original parties, but between the new parties on the bill of revivor. I agree to the

doctrine, that, where the parties are citizens of different States at the commencement of the suit, a subsequent change of domicil and citizenship, will not oust the jurisdiction. That was so held in *Morgan's Heirs* v. *Morgan* (2 Wheaton R. 290, 297, and *Mollan* v. *Torrance* (9 Wheaton R. 537). But in that case, the original parties were still before the Court. But in the present case a new party plaintiff is introduced, whose citizenship is, at the time of his filing his bill, in the same State with the defendants.

It is true, that the Judiciary Act of 1789, ch. 20, sect. 31, authorizes executors and administrators to appear and prosecute and defend suits, pending at the time of the death of their respective testators and intestates, unto final judgment. But I am not aware, that this provision has ever been held to apply to executors and administrators, who could not sue or defend as original parties in such suits. If there had been any known course of decisions, which had established such a right and practice, I should follow it, whatever might be my private doubts. But no such course of decisions has been appealed to.

It appears to me, then, that the bill of revivor must be dismissed, as the controversy, which it seeks to revive, is now between citizens of the same State. As the District Judge concurs in this opinion, the bill is accordingly to be dismissed, for want of jurisdiction.[1]

[1] After this opinion was delivered, the cause was continued to the next term, at the suggestion of the parties. The Court, at that term, suggested, that they entertained, upon farther reflection, great doubts on the point; and recommended that the case should be taken to the Supreme Court for a final decision, which was accordingly done. The case is yet pending in the Supreme Court.

Nathaniel Adams and others v. Norton Wilbur.

The Statute of Wills of Rhode Island of 1798, § 6, provided, "That any child, &c. not having a legacy given him in the will of his father or mother, shall have a proportion of the estate of his parents assigned unto him, as though such parent had died intestate." This section was repealed in 1803. *Held*, that a will, made in 1801, while the foregoing provision was in force, where the testator died in 1804, after it had been repealed, was not affected by it, but was fully operative to pass a good title to the devisee.

Ejectment for lands in Newport (Rhode Island). The parties agreed to a special statement of facts, as follows:

Silas G. Huddy being seized of the demanded premises in fee by his last will and testament, dated, made and duly executed on the seventh day of December, A. D. 1801, and after his decease duly proved, and approved by the Court of Probate, devised the same premises in fee to his wife, Elizabeth Huddy, he, the said testator, then having no issue. That the said Silas and Elizabeth had a child born on the 31st day of July, A. D. 1802, which child died in infancy, before the said testator. On the 22d day of April, A. D. 1804, said Silas G. and his said wife Elizabeth, had another child born, named Silas G. Huddy, Jun., who survived both the testator and his said wife, and died July 8, A. D. 1818, in the fifteenth year of his age, intestate, and without issue. That Silas G. Huddy, senior, the testator, died at sea in the month of August, A. D. 1804. That said Elizabeth Huddy, widow and devisee of said Silas G. Huddy, senior, by her last will and testament, dated, made and duly executed on the 20th day of August, A. D. 1809, and after her decease duly proved and approved, devised the use and improvement of the premises to her mother, Ann Bently, until her (the testatrix's) son, the said Silas G., should be twenty-one years old, and then to her said son in fee; and if her said mo-

ther should die before her son arrived at that age, then to the said son in fee, and if said son should die without issue of his body, then to her said mother in fee. And afterwards, in the year 1809, said Elizabeth died, her said mother and son both surviving. The said Ann Bentley, the mother, died in the year 1812, and the said Silas G. Huddy, the son, died July 8th, A. D. 1818, as before stated. That said Elizabeth Huddy had two sisters, one of whom, named Abigail Adams, now deceased, was the mother of the plaintiffs, who are the only surviving children of said Abigail, and are next of kin to the said Silas G. Huddy, Jr. of the blood of his mother, the said Elizabeth.

If, upon this statement of facts, it shall be the opinion of the Court that the plaintiffs are entitled to recover, then it is agreed that judgment shall be entered for them, the plaintiffs; otherwise, for the defendant.

The cause was argued by *Hazard* for the plaintiff, and by *Turner* and *Pearce* for the tenant.

Hazard. By the agreed statement of facts, upon which the parties have put this case, it appears that the defendant does not set up any adverse title, but leaves the plaintiffs to make out their title to the demanded premises. And as to this, it is agreed, that the premises were vested in fee in Silas G. Huddy, Jr. and came to him by devise from his mother, Elizabeth Huddy, and that said Silas died seized of the premises, July 8th, 1818, intestate, under age, and without issue, leaving the same to his heirs at law. It is also agreed, that the plaintiffs are next of kin to the said Silas G. Huddy, Jr., of the blood of said Elizabeth Huddy, his mother, and devisor.

The title of the plaintiff depends upon the Rhode Island Statute of 1798 (Digest of 1798, p. 287), "directing the descent of intestate estates," &c.; by the 1st section of which statute, it is provided, that if such right, title and interest to such real estate, came by descent, gift, or devise from the parent or other kindred of the intestate, and such intestate die without

issue, the same shall vest in and be divided equally amongst the next of kin to the intestate, and those who legally represent them, if any of them be dead, of the blood of the person from whom such right, title, or interest came or descended. This is the title under which the plaintiffs claim. This title is good, unless defeated by the provision contained in the 6th section of the Rhode Island Statute of Wills of 1798. It is unnecessary to consider what application that provision might have (if still in force) to the present case, since all that part of the said 6th section was repealed by an act of the legislature, passed expressly and solely for that purpose, June 4, 1803, (more than a year before the death of S. G. Huddy, senior, and fourteen months before the birth of his son), entitled, "An act to repeal part of the 6th section of the act, entitled 'An act prescribing the manner of devising lands, tenements and hereditaments, and of disposing of personal estate by will.'" This repealing act is contained in the "Supplement to the Digest of the Laws in 1798," and remained in full force until the last revision of the laws in 1822, when the general acts relating to devises and wills were revised, and the act now and ever since in force was passed.

Turner and *Pearce* for the tenant.

The question now presented to the Court we conceive to be this, Did the Statute of 1803, repealing in part the Statute of 1798, under which the will was made in 1801, while the Statute of 1798 was in full force, and unrepealed, so far act retrospectively as to change the legal destination of real estate under that will? In order to entitle the plaintiffs to recover in this action, it is incumbent on them successfully to maintain the affirmative of this question; their case depends entirely on their so doing. Yet the argument is rather implied than expressed, and as it is supported and enforced by no authorities introduced, if available it must be considered as depending upon the application of general principles of law, independent of authorities.

Every will, in a certain sense, is inchoate and imperfect, until

the death of the testator; but it is so considered only in reference to the estate that will, or will not pass by it; and not at all in reference to the law by which it shall be construed, controlled and governed. The preparation and the legal execution of a will, are the acts of the party—the testator himself. When every ceremony and requisite on his part has been performed, the instrument is perfect and complete, so far as human agency and human law are concerned; and the only remaining act necessary to its full and complete consummation, is the act of God alone, the death of the testator. This is the only sense, and utmost extent, in which a will, duly executed according to the requirements of law, as the law stands at the time of its execution, ever has been, or can be considered as inchoate. We are not aware of any legal principle, under which a different rule has been applied, in this respect, to wills, than is applied to deeds, bonds, mortgages, or any other contracts or writings, whether under seal or not; in relation to all which we deem the rule to be, that effect shall be given to them, according to the law, as it stood at the time of their execution. Upon the ground taken by the plaintiff, the act of June 4, 1803, would, in this case be entirely retrospective; and although we shall not contend, that the legislature may not pass, and have not passed retrospective laws, in contradistinction to *ex post facto* laws, yet we feel warranted by authorities in saying, that if such was the intention of the legislature, at the time the act was passed, it must have been clearly expressed in the act itself; and cannot be legally presumed. Now does the act of June 4, 1803, contain any expression giving it a retroactive operation on wills, that had been then already made? The language and the intention are evidently prospective, and can be considered as applicable to such wills only as should thereafter be made; and not to those that had been already executed. In *Gilmore* v. *Shooter*, 2 Mod. R. 310, the Court said, in giving judgment for the plaintiff, "it could not be presumed, that the act had a

retrospect to take away an action to which the plaintiff was then entitled; for if a will had been made before the 24th of June, and the testator had died afterwards, yet the will had been good, though it had not been in pursuance of the statute." The same case is cited in *Couch* v. *Jeffries*, 4 Burrow R. 2461, and is also reported in 2 Show. R. 16; 2 Lev. R. 227; 1 Ventr. 330; and Jopes R. 108.

The law had been such in Rhode Island ever since the passage of the 12th William III. ch. 7. The legislature of Rhode Island, in the same year passed an act, on the 30th day of April, 1700, entitled "An act for putting in force the laws of England, in all cases where no particular law of this colony hath provided a remedy," providing as follows: "That in all actions, matters, causes and things whatsoever, where no particular law of this colony is made to decide and determine the same, that then, and in all such cases the laws of England shall be put in force, to issue, determine and decide the same; any usage, custom or law to the contrary notwithstanding." Dig. R. I. Laws 1744, p. 28. The act here recited, adopted the English statute of 12th William III. ch. 7, as the law of Rhode Island, and it continued in force until the revision of 1798, when the statute of this State was passed, copied from that which had been passed in Massachusetts in 1784; and although both the statutes of Massachusetts and Rhode Island omit the preamble to the section in the English statute, yet it was decided, 1 Mass. R. 150, that it was entitled to consideration under a new statute *in pari materiâ*. The testator then, in this case, when, on the 7th December, 1801, he made his will, may be fairly presumed to have known what the law then was, and probably acted under the advice of counsel; if so, he must have been aware, that our statute not only amply secured and provided for children subsequently born, who were, technically speaking, posthumous, but also for all such as might be born after the will was made, and before his own death. To give the will, therefore, at this time

a different construction, or rather a different effect, would be to destroy the presumed intent of the testator, and would prove both inconvenient and unjust. See *Whitman* v. *Hapsgood*, 10 Mass. R. 437; *Inhab. of Somerset* v. *Inhab. of Dighton*, 12 Mass. R. 383; *Church* v. *Crocker*, 3 Mass. R. 17; *Inhab. of Medford* v. *Larned*, 16 Mass. R. 215; *Wilde et ux.* v. *Brewer*, 2 Mass. R. 570; Bigelow's Digest, p. 741, art. 14, 15; 2 Gall. R. 209.

The argument for the defendant might be illustrated by a great variety of examples; one or two only shall be mentioned. Suppose a will had been made before the statute was passed, requiring its execution and publication before three witnesses, and it had been witnessed by two witnesses only, and the testator had not died until after the enactment of the statute; would it be argued in such a case, that the will was void? Again, the legislature of Rhode Island have recently passed an act, requiring all bills of sale that are intended for security, and to operate as mortgages, to be recorded in the same way that deeds of real estate are; suppose such a bill of sale had been executed prior to the passing of that law, and that the term of payment did not expire by the condition of the deed, until after it became a law, it is not supposed, that if such bill of sale were not recorded, that therefore it would be void against attaching creditors, or others.

Story J. delivered the opinion of the Court. The testator (Silas G. Huddy) made his will in 1801, having then no issue; and thereby devised the premises in fee to his wife. He afterwards died, in August 1804, leaving his wife, and a son, who was born in April, 1804; and who afterwards died, in July, 1818, intestate, and without issue. The wife died in 1809; and the plaintiff claims, as heir of the son, *ex parte maternâ*; and the defendant claims, as heir of the son, *ex parte paternâ*.

The Statute of Wills of Rhode Island, of 1798, in the 6th

section, provides, "That every child, or children, or their legal representatives, in the case of their death, not having a legacy given him, her, or them, in the will of their father or mother, shall have a proportion of the estate of their parents assigned unto him, her, or them, as though such parent had died intestate;" with a *proviso*, not important to be mentioned in the present case. This section was in force at the time, when the testator's will was made, in 1801; but, at the time of his death, in 1804, it had been repealed (Act of 4th June, 1803). If it had been in force at the time of the testator's death, it is admitted, that the plaintiff would have no title to the estate; as it would have vested in the son by descent, *ex parte paternâ*, in virtue of the section. The real question, therefore, between the parties, is, whether the intermediate repeal defeated the title, which the son would otherwise have taken. Our opinion is, that it did. The will was good and operative to all intents and purposes to pass the whole of the premises to the wife, subject only to be defeated by any title, which might accrue to the son under the section above quoted. The will was ambulatory during the life of the testator; and no title could accrue to the son until the death of the testator. If the son had died during the life-time of the testator, without issue, it is clear, that the will would have had precisely the same effect, as if he had never been born. To give the son then any title in the estate, two things must have concurred; first, that he should have survived the testator; and, secondly, that at the time of the death of the latter, there should have been some law in force, which should confer a title on him. He is to take, not by the bounty of the testator, but by the operation of law. Now, at the time when, if ever, this title was to accrue, there was no act in force, which conferred any such title upon him. It had been repealed; and the repeal put an end to the possibility of his acquiring any title under it. The argument of the defendant's counsel seems to rest mainly on the foundation, that an inchoate title

was created in the son by the execution of the will, which ought not to be defeated by relation by the subsequent repeal. But we take the law to be, that no inchoate title vested at all by the execution of the will; and that the son's title, if any, must first accrue on the death of the testator. Having said thus much upon the point, it appears to me, that there is no farther room for argument upon it.

Our judgment is, that the defendant is entitled to recover the premises sued for.

SAMUEL F. MANN AND OTHERS

v.

GEORGE WILKINSON AND OTHERS.

A Bill of Equity, after a decree, in certain cases may be retained for further future proceedings; but, in the case of an alleged violation of a waterprivilege, it will not be retained, in order to give the plaintiffs an opportunity, by new trials and proofs, to establish the fact, that a further lowering of the dam of the mill of the defendants is necessary to the protection of their rights.

Quære. **Whether, under the Mill Act of Rhode Island, a mill-owner may raise his dam, so as to affect any water privilege or dam already on the stream, and above his own mill.**

THIS was a bill in equity for an abatement of a nuisance to the cotton mills of the plaintiff, situate on the Blackstone river, by the defendants, by raising the dam of a mill, called the Albion Mill, lower down on the stream, and thereby flowing back the water upon the plaintiff's mill-wheel.

At a former hearing the Court made an interlocutory decree, by which the cause was referred to a Master. The Master made his report at the last June term of the court; to which exceptions were taken by both parties.

The cause was afterwards argued upon the exceptions by

R. W. Greene and *Webster* for the plaintiffs, and by *Pratt* and *Whipple* for the defendants.

STORY J. now delivered the opinion of the Court to the following effect. On full consideration of all the exceptions taken by the parties, we are of opinion, that they ought all to be overruled, and the report of the Master ought to be confirmed. We do not propose to give an elaborate opinion upon all the matters of the exceptions, as they would not be very intelligible without going at large into all the various topics asserted in the arguments at the bar, which would occupy too much time. It is sufficient to say, that we have most deliberately weighed them all; and are satisfied, that no one of them, with reference to the pleadings, and the actual posture of the case, is maintainable.

There are two points, however, upon which a few words may be proper to be said, in order to explain the final decree of the Court. We think, that the proof stated by the Master conclusively establishes the fact, that the dam of the Albion mill ought to be lowered two feet, in order to restore the plaintiffs to their rights as riparian and mill proprietors. The plaintiffs have asked, that the bill might be retained; so that the dam might be still further lowered, if upon future trials and proofs they can establish the fact, that there is a necessity of so doing, to protect and sustain their existing rights. But if the bill should be so retained, there must be a reciprocity on the other side. And the defendants ought to be let in to establish, by future trials and proofs, that the dam has been directed to be lowered beyond what the plaintiffs' rights required. What would this be, but to try the whole cause *de novo* on both sides, upon new proofs after publication? Such a course is, in our judgment, incompatible with the known course of practice and principles of courts of equity; and would open a door to interminable litigation. The very object of courts of equity, to put an end to controversies, would be defeated. We entertain no doubt, that

in suitable cases, bills of equity may be retained after a decree for further future proceedings. But the present is not one of that sort.

One argument of the defendants is founded upon the existence of the old Eel dam, as an obstruction to the plaintiffs' rights; and it is said, that the defendants are entitled to the benefit of such obstruction, to its full extent, in flowing back the water upon the plaintiffs' mills; that is to say, to the extent of six inches, as it is intermediate in the stream between the Albion mill dam and the plaintiffs' mills. The effect of this would be to require the Albion dam to be lowered only eighteen inches instead of two feet. The Court are of opinion, that the state of the pleadings does not raise the question, whether that Eel dam is to be treated as *pro tanto* a permanent obstruction of the plaintiffs' rights, as mill proprietors, or as a mere obstruction at the sufferance of the plaintiffs and the other riparian proprietors. The defendants have not asserted, that they have acquired any title to the Eel dam by any conveyance or transfer of the proprietors thereof. Nor have they averred, that they have acquired any right to the same by operation of law, by a flowage of the same under the Mill Act of Rhode Island. And the decree of the Court ought to be founded upon the *allegata*, as well as the *probata*. These points, not being put in issue, are of course not properly matters in proof. If it had been averred in the pleadings, and established in proof, that the plaintiffs set up such a right to the Eel dam by flowage, under the Mill Act of Rhode Island, then a very important question might have arisen, whether, under that act, it was competent for any mill owner to raise his dam so as to flow back upon and affect any water privilege, or dam, already in existence across the stream above his mill; or whether the right of flowage is confined to cases, where no dam is erected, or in the course of erection, and the only flowage is to mere land. Upon this question we give no opinion; because the pleadings do not raise it; and as the defendants

set up no title to the Eel dam, they cannot protect themselves under it, as an obstruction, in aid of the rights of the Albion mill proprietors.

Another point arises: the Master's statement in the close of his report is, that flash-boards might, at certain seasons of the year, be erected on the Albion dam, sixteen inches and one half inch, without injury to the plaintiffs' rights. We are of opinion, that this is not a matter before us upon the present bill; and we shall, in framing the final decree, reserve to the parties all their rights respectively upon this point. If the Master's report were confirmed in this particular, it might give rise to the suggestion, that the Court had conferred a right on the defendants to raise such flash-boards in such seasons. If, on the contrary, the Court disaffirmed this part of the Master's report, it might be conclusive against the defendants. The decree will be so framed as to escape both of these inconveniences; and will leave the parties to the assertion of their rights respectively, in regard to flash-boards, hereafter, as they may be advised.

These are all the explanations, which the Court deem it necessary to make upon the present occasion. The Master's report is to stand confirmed, and the decree of an abatement of the Albion dam two feet, and a perpetual injunction will be consequent thereon.

This cause came on again to be heard upon the Master's report, and the exceptions taken thereto by the parties respectively, and was argued by counsel. On consideration whereof it is ordered, adjudged and decreed by the Court, that the exceptions of the said parties respectively be, and the same are hereby overruled, and that the said report do stand in all matters confirmed except as hereinafter stated. And it not appearing by the answers of the defendants, that they assert any right or title to the Eel dam, in the said answers stated, under the owners thereof, by operation of law or otherwise, nor what the true nature and extent of the right and title of the said owners of said

Eel dam was, and is;—It is, thereupon, further ordered, adjudged and decreed, that the said Albion dam in the said pleadings mentioned, ought to be reduced from its height at the time of the filing of the plaintiffs' bill, the space of twenty-four inches from the top thereof, as a nuisance to the privileges and mills of the plaintiffs in the same bill mentioned, and in violation of their rights thereto; and the said defendants are hereby ordered to abate and reduce the same Albion dam the said twenty-four inches accordingly, within forty days from the entering of this decree. And it is further ordered, adjudged and decreed, that the said defendants, their heirs and assigns be, and they hereby are, perpetually enjoined, after the same Albion dam is so abated and reduced as aforesaid, never thereafter to raise the same dam above the level, to which the same shall be so abated and reduced as aforesaid. And it is further ordered, adjudged and decreed, that a writ of injunction do issue forthwith against the defendants, commanding them to comply with all and singular the premises so enjoined upon them.

And inasmuch as it appears from the Master's report, that in low states of the river, when it is not obstructed by snow and ice, the defendants might, without injury to the plaintiffs, put flash-boards on their dam sixteen inches and one half wide, and the same keep up, until the water in the river flows over the top of them with their present mill gates drawn, and it is not the intent of the Court, in any manner, to act upon this part of the said report, but to leave the parties respectively to their respective rights in regard thereof in the same manner, as if the same were not stated in the same report;—It is further ordered and declared, that no part of this decree is to be construed in any manner to affirm or deny the right of the defendants to put up such flash-boards; but the parties are left to their respective rights in the premises, as if the same were not stated in the report.

And it is further ordered and decreed, that the plaintiffs do recover their costs in the premises.

Timothy C. Kendall *v.* S. Almy and others.

An assignment conveyed to the plaintiff "all the goods, wares, merchandises, and *personal property of every kind*, belonging to the late firm," &c. *Held*, that the words "personal property of every kind," in the foregoing connexion, signify visible, tangible property, *ejusdem generis*, as goods, &c. and that an interest under a contract would not pass thereby.

A Court of Equity will not enforce a specific performance of a contract, as between the original parties, unless its terms are clear, definite, and positive; and *a fortiori*, where the specific performance is sought against an assignee.

A party, to entitle himself to a specific performance of a contract, must show, that he has been always ready to perform his part of it.

"It is further agreed, that if Low & Fenner should redeem their one half of the aforesaid contract, by the payment of the drafts drawn on them by R. Hazard & Co. on account thereof, to return half of the aforesaid $5000 to said S. Almy, he relinquishing to said Low & Fenner all claim upon the aforesaid one half of the said contract." *Held*, that Low & Fenner, in order to derive benefit under the preceding clause, should have proceeded forthwith, or within a reasonable time, to make the redemption specified.

Bill in Equity, by Timothy C. Kendall, of the city of Boston, in the District of Massachusetts, and a citizen of the State of Massachusetts. The substance of the bill was as follows:

On the 3d of March, A. D. 1828, an agreement was made and entered into by and between Christopher Lippitt, of Jewett city, in the Connecticut District, manufacturer, and a citizen of the State of Connecticut of the one part, and Rowland G. Hazard, and Isaac P. Hazard, of South Kingstown, in the Rhode Island District, manufacturers, then in company, under the firm of R. G. Hazard & Co. and both citizens of the State of Rhode Island, &c., of which agreement a copy marked A is hereunto annexed, and which your orator prays may be taken as a part of this bill of complaint. That some time after the execution of said agreement, the said R. G. Hazard & Co. entered into an agreement with Charles Low and Cornelius G. Fenner, both of

the city of Providence, in said Rhode Island District, there in company, under the firm of Low & Fenner, and both citizens of the State of Rhode Island, &c.; by which agreement the said R. G. Hazard & Co. sold to the said Low & Fenner, one half of their interest in the agreement first mentioned, and in the profits to be therefrom realized, and agreed to pay over to said Low & Fenner one half of said profits, as fast as they were received by the said R. G. Hazard & Co., the said Low & Fenner agreeing on their part to advance to the said R. G. Hazard & Co. one half of the money which they were bound to advance by virtue of their said agreeement, with said Lippitt, and at such times as the said R. G. Hazard & Co. should need the same; and also to bear one half of the loss (if any) which should accrue to them the said R. G. Hazard & Co. under said agreement. And in case no profits were realized from the business under said agreement, then the said R. G. Hazard & Co. were to charge the said Low & Fenner no compensation for their attention to and services in the business. And in case a profit should be realized, under the agreement aforesaid, the said R. G. Hazard & Co. were to charge a reasonable compensation for their services in the business, to be agreed upon after the contract with the said Lippitt had expired. It was further agreed between the said R. G. Hazard & Co. and the said Low & Fenner, that the interest of the said Low & Fenner in the agreement between the said Lippitt and R. G. Hazard & Co. and in and to the profits to be therefrom derived, and their liability to pay the losses aforesaid, should commence on and from the date on which said agreement was made and executed, to wit, the 7th day of March, A. D. 1828. That the said R. G. Hazard & Co., in pursuance of their said agreement with said Lippitt assumed on themselves the payment of all the machinery provided for in said agreement, to wit, eight hundred spindles, and preparation therefor; and the said Low & Fenner, advanced to the said R. G. Hazard & Co. one half of all the moneys by the

said R. G. Hazard & Co. assumed to be paid for said machinery, and at such times as the said R. G. Hazard & Co. called for the same.

That immediately after the said 7th day of March, A D. 1828, the said R. G. Hazard & Co. began to supply the said Lippitt with cotton under the agreement aforesaid, and to receive and sell the goods manufactured therefrom.

That after the said R. G. Hazard & Co. had assumed and paid all the moneys which they were bound to assume and pay by virtue of their said agreement with said Lippitt, and after the said Low & Fenner had advanced to the said R. G. Hazard & Co. all the moneys which they were bound to advance the said R. G. Hazard & Co. as aforesaid, to wit, one half of the whole sum, paid by the said R. G. Hazard & Co., they, the said R. G. Hazard & Co. failed, and on the 30th of May, A. D. 1829, made and executed to Thomas R. Hazard, of South Kingstown aforesaid, manufacturer, and a citizen of the State of Rhode Island, &c. and the said Charles Low, a deed of assignment of all their property, in trust, for the benefit of the creditors of the said R. G. H. & Co. That said deed of assignment conveyed to said assignees all the right, title and interest of the said R. G. H. & Co. in and to said contract with said Lippitt, and in and to the machinery therein referred to, and in and to all the profits to be derived from said contract, and from supplying said Lippitt with cotton under the same. That the said Low & Fenner, after they had advanced to said R. G. Hazard & Co. all the moneys they were bound to advance them, under and by virtue of their said agreement with them, to wit, on the 4th day of July, A. D. 1829, failed, and on the same day made and executed to your orator a deed of assignment of all their property, in trust, for the benefit of their creditors. That by said deed of assignment was conveyed to your orator the title to one half of the profits then received, and to be received under the agreement aforesaid by the said R. G. Hazard & Co. or their assigns.

That soon after the making and executing of said deed of assignment by the said R. G. Hazard & Co., to wit, on the —— day of ———, A. D. 1829, the said Thomas R. Hazard transferred to Sampson Almy, manufacturer, of said city of Providence, and a citizen of the State of Rhode Island, &c. said contract, and the right to supply said Lippitt with cotton, to be manufactured into goods in conformity to said contract; and to receive the profits arising from the sale of the same,—one half of the profits so by the said Almy received, to be by him accounted for and paid over to your orator as assignee of said Low & Fenner. That the said Almy, at the time he accepted the transfer of said contract, had notice of the interest which your orator, as the assignee of said Low & Fenner, had in said contract, and of your orator's right to receive one half of said profits.

That by virtue of said transfer, and ever since the same was made, said Almy has continued to supply said Lippitt with cotton, and has received the goods into which the said cotton was manufactured, and has sold the same, and received the proceeds of the sales, that the profits which have thus been received by said Almy, under and by virtue of said contract, amount to the sum of $12,000, one half of which justly belongs to your orator as assignee of Low & Fenner, and ought to be paid to your orator by said Almy.

The bill prayed, that the said Almy be decreed to pay over to the complainant one half of the profits by him received, as aforesaid; also to supply the said Lippitt with cotton under the said contract jointly and equally with the orator, and to receive only one half of the profits thereof, and equally transact the business under the said contract, until the profits are received jointly with the orator, and until the expiration of the said contract. Also, that the said Thomas R. Hazard may be for ever enjoined from setting up any title or claim to that part of the profits under the said contract, which was conveyed to the said Low & Fenner, and by them to the orator; or from doing any

act which shall in any manner obstruct the orator in the receipt and enjoyment of all the benefits and profits under and by virtue of the said contract, to which the orator, as assignee of the said Low & Fenner, is entitled. The bill concluded with a prayer for general relief.

The Lippitt contract, which was made a part of the bill, was as follows:

This agreement, made and entered into between Christopher Lippitt, of Jewett city, Connecticut, of the one part, and R. G. Hazard & Co. of Providence, Rhode Island, of the other part, witnesseth: That the said Hazard & Co. do hereby agree, to assume the payments of certain parcels of machinery, amounting to five hundred spindles and preparation, now purchased or contracted for by said Lippitt; and also for three hundred spindles and preparation, to be hereafter contracted for by him, the said Lippitt, they receiving bills of sale of the same as security for the amount advanced, the amount not exceeding $10,000.

And the said Lippitt, on his part, agrees to run the said machinery in his factory at Jewett city, for the benefit of the contracting parties, in manufacturing cotton into 4-4 brown sheetings, the yarns to be spun from No. 16 to No. 18, well woven and well manufactured in all respects, and pay all proper and necessary attention to the business at said mill, to receive the cotton in Providence, and deliver the goods there, for and in consideration of which, he is to receive three and one half cents cash per yard, which is to be in full for the manufacturing of said goods.

And the said Hazard & Co. further agree to pay all proper and necessary attention to purchasing the stock, disposing of the goods, negociating drafts, and any and all other business which it may be requisite for them to attend to in Providence, and charge nothing for the same, unless they should guarantee sales; in that case the usual guarantee commission is to be allowed them. It is further agreed, that the profits, arising from said

business, shall be equally divided between the contracting parties. This agreement to commence immediately, and continue until the 25th day of March, 1830; and if, at that time the said Lippitt's part or one half of the profits, with the interest thereon, which are to be applied to the payment of the money advanced, should not be sufficient to pay said advance, he is then to be at liberty to continue until it shall be paid for in this way, or to have the privilege of paying the deficit with the interest, from that time, in two years from the termination of this contract.

It is also understood, that interest at the rate of six per cent. per annum, is to be allowed on all amounts received, or paid by either of the contracting parties (except the advance on account of the purchase of machinery), from the time at which it was received, or paid, to the time of settlement, which is to be semi-annually, and on all balances then due, to the time of final settlement. The account with the factory, in consequence of this agreement, is to be kept with the Griswold Factory, and all just charges against said factory to be as binding on the contracting parties, as if entered in their names.

It is understood, that the machinery, mentioned in the foregoing instrument, is only to be holden by the said Hazard & Co. as collateral security for the money advanced, and that it is to be given up to said Lippitt on his refunding the said advance, until which time the said Lippitt hereby agrees to keep it insured.

The separate and several answer of Sampson Almy, one of the defendants, was in substance as follows:

That he believes, that the said Christopher Lippitt and the said Rowland G. Hazard and Company, did on the 7th day of March, A. D. 1828, sign and execute the contract marked A, a copy of which is annexed to the complainant's bill. That whether the said firm of Low and Fenner, had any interest or concern in said contract, and if any, what, and when or how acquired, this defendant has no knowledge, except from the declarations

of the said Low and Fenner, and the said Rowland G. Hazard, as hereinafter stated.

Nor does this defendant know, whether the said Low and Fenner advanced any money to the said Lippitt, or to the said Rowland G. Hazard and Company, on account of said contract, except as hereafter stated.

This defendant admits the failure and assignment of the said Rowland G. Hazard and Company, as set forth in said bill, but whether said assignment, conveyed the interest of the said Rowland G. Hazard and Company, in and to said contract with the said Lippitt, and in and to said machinery, is a legal question which the defendant submits to the decision of this honorable court.

This defendant has been informed and believes, that the said Lippitt, at the time of said assignment of the said Rowland G. Hazard and Company, lived in the State of Connecticut, and the said machinery was also then in the mill of said Lippitt, in said State, and that by the law of the State of Connecticut, no assignment of an insolvent debtor, giving a preference of one creditor over another, is valid as to property in the State.

This defendant admits, that he made a contract with the said Rowland G. Hazard, in relation to supplying said mill with cotton, but denies, that by said contract, he agreed to pay, or was bound to pay any part of the profits of the said mill, to the said complainant.

All that this defendant now recollects, concerning said contract, is, that some time before the failure of Low and Fenner, which he thinks took place on the 4th of July, 1829, the said Rowland G. Hazard called on this defendant, and stated that R. G. Hazard and Company, had made a contract with Christopher Lippitt, of Jewett city, in the State of Connecticut, for manufacturing cotton sheetings, and that Charles Low or Low and Fenner, were interested in said contract, but had refused to go on with it and furnish the cotton, fearing that they might lose

by the business. The cotton business, at that time, was considered by many as a very precarious business. The said Hazard asked this defendant if he would supply said Lippitt with cotton, under said contract, and if so, upon what terms. After several conversations on the subject, this defendant agreed to go on and execute the contract, on condition that this defendant should have the profits of one half of the mill, for his trouble and risk, the loss, if any, to fall entirely upon him. The said Rowland G. Hazard and this defendant, then conversed with the said Charles Low, in the presence of the said Fenner, both of whom expressed their satisfaction with the arrangement. Hazard and Low agreed to give this defendant reasonable notice, in case of any change in the arrangement then made. Said agreement with this defendant was minutely stated, and this defendant believes was fully understood by the said Hazard, and the said Low and Fenner. Whether the said Low acted as one of the assignees of the said Rowland G. Hazard and Company, or for the said Low and Fenner, or for both, in making said contract, this defendant does not know. But he does know, that in several of the conversations on the subject, the said Rowland G. Hazard stated, that the said Low and Fenner were equally interested with the said Rowland G. Hazard and Company, in said Lippitt contract, which Low and Fenner denied, and stated that they never had any interest of any kind, in said contract.

This defendant proceeded to execute said contract with said Lippitt, in conformity with his agreement with Rowland G. Hazard, who acted as the agent of the assignees of the said Rowland G. Hazard and Company, and was fully empowered so to act, as this defendant believes. He purchased cotton, and made sales of the cloth, and paid other expenses, as by the accounts hereunto annexed, marked A, will appear, and this defendant has no other knowledge or means of knowledge, of the persons of whom he made purchases of cotton and other articles, of the persons by whom the sales of the cloth were

made, the prices, times of sales and purchase, and the ultimate amount of profit, than what appears by the papers last referred to.

On the 9th of March, 1830, this defendant purchased of the said Rowland G. Hazard, as agent of the said assignees, all the interest which the said Rowland G. Hazard and Company, and the said assignees had in and to said Lippitt contract, and said machinery, by a written contract of sale of that date, a copy of which marked B is hereto annexed. The question, whether Low and Fenner ever had any interest in said Lippitt contract was still undecided, the said Rowland G. Hazard wishing to establish the affirmative, and so declaring the fact to be, and the said Low and Fenner denying it.

Some months after this written contract, the said Rowland G. Hazard informed this defendant, that he had settled the disputed question, concerning Low and Fenner's interest in the Lippitt contract, and had allowed them the sum of twenty-seven hundred dollars, which was to settle all their claims upon the Lippitt contract and machinery, and that as that question was settled, this defendant might consider himself as the sole owner of said Lippitt contract and machinery, for the sum of five thousand dollars, which this defendant then agreed to, and from that time, did consider himself sole owner.

The said Charles Low had, previously to said written contract, offered this defendant said machinery and Lippett contract for said sum of five thousand dollars. In the contract for the purchase of this machinery and Lippitt contract, by this defendant, for the sum of five thousand dollars, no mode of payment was ever agreed upon by this defendant, and the said Rowland G. Hazard. This defendant had a claim of about four thousand dollars upon the said Rowland G. Hazard & Co. which was among the preferred claims in their assignment, and it was probably expected by the said Rowland G. Hazard, and was expected by this defendant at the time, that that claim

should be settled and adjusted when the five thousand dollars was paid (though this defendant has no recollection that it was so stated at the time). This defendant has often expressed his wish to have a settlement of all debts and claims existing between himself and the said Rowland G. Hazard & Co.; such a settlement has never yet been made.

This defendant continued to furnish said Lippitt with cotton under said contract, from the time of the verbal agreement between this defendant and the assignees of the said Rowland G. Hazard & Co., up to the 11th day of September, 1832, after which the said Lippitt did not send for any more, giving as a reason, that the said Low & Fenner, or Charles Low, forbade his receiving it of this defendant.

From the time of the verbal contract of July, 1829, to some time in the latter part of the year, 1832 or beginning of 1833, as this defendant thinks, neither the said Low or Fenner, ever intimated to this defendant, that they claimed any interest in said Lippitt contract; neither of them ever furnished, or offered their proportion of the cotton for said mill, nor to pay any part of the other expenses; nor did either of them say or do any thing, that would have subjected them to any loss in case such had been the result of the business. On the contrary, this defendant believes, that the said Low & Fenner did sell to the said Rowland G. Hazard, as agent of said assignees, all their interest in said Lippitt contract, and abandon all claim to the same, which this defendant avers to be the fact, and denies that the said Low & Fenner, or their assignee, the complainant, has any interest in the said Lippitt contract, or in said machinery. The said Charles Low acted as the agent of the complainant in all the business of Low & Fenner, as this defendant has been informed and believes; and in all the conversations and contracts with the said Rowland G. Hazard, before stated, this defendant understood, that the said Rowland was acting as the agent of the assignee of Rowland G. Hazard & Co.

This defendant further states, that on the 18th of August, 1831, he paid William Field the sum of five hundred and fifty dollars for a double speeder for said mill, the same being necessary, as he believes, to the successful operation of said machinery, and which speeder is now in said mill, and forms a part of the machinery thereof, and he claims an allowance of the same, out of the balance of the profits in his hands, or in such other way as this Court may deem equitable, in the event of their deciding, that the plaintiffs, or the said Low & Fenner have any interest in said contract, or in said machinery, which this defendant again denies, and prays the Court to adjudge accordingly.

The separate and several answer of Thomas R. Hazard, one of the defendants, was in substance as follows:—

That he believes that the said Christopher Lippitt and the said Rowland G. Hazard & Co. did sign and execute the contract marked A, and annexed to the complainant's bill.

That he believes, that the said Low & Fenner purchased one half of said contract of the said Rowland G. Hazard, and paid for all, or nearly all, of said half by their acceptances; but as said contract was made before the failure of the said Rowland G. Hazard & Co., this defendant is not particularly informed of the particulars thereof.

This defendant admits the failure of the said Rowland G. Hazard & Co., and that he was constituted their assignee as stated in said bill.

He admits the failure of the said Low & Fenner, and the appointment of the complainant, their assignee, as stated in said bill.

This defendant also admits and states, that he, as assignee of the said Rowland G. Hazard & Co. (not considering himself authorized as to go on and execute said Lippitt contract, by supplying said mill with cotton,) did make a contract with Sampson Almy, some time in the year 1829, to supply said mill

with cotton, and that the said Sampson, in pursuance of said contract, did supply said cotton until some time in the year 1830, when said contract was sold to the said Sampson for the sum of five thousand dollars, and that a debt due from him and the said Low, as assignees of the said Rowland G. Hazard & Co. to the said Sampson, of about five thousand dollars, was to be deducted from said price, and the balance paid to the assignees of Rowland G. Hazard & Co. This defendant further states that he believes, that the said Charles Low assented to said contracts with the said Almy, so as to bind any interest the said Low & Fenner, or their said assignee, ever had in said Lippitt contract.

The contracts with the said Almy were principally made by the said Rowland G. Hazard, as agent of this defendant, and therefore, the circumstances were not particularly known to this defendant; but he believes and states, in defence of said bill, that all the interest of the said Low and Fenner in said contract, or of the complainant, was sold to the said Almy by the said Rowland G. Hazard, and with the consent of the said Low & Fenner.

The joint answer of Charles Low and Cornelius G. Fenner, two of the defendants, was in substance as follows:

That they admit the making the agreement, mentioned in said bill, and of which a copy is thereunto annexed, marked A, between the said Christopher Lippitt and R. G. Hazard and J. P. Hazard, doing business under the firm of R. G. Hazard & Co., and, that the said R. G. Hazard & Co. subsequently sold to these defendants, said Low and Fenner, one half of said contract, and one half of all the profits already derived and to be derived therefrom, upon the terms and conditions in said bill stated. These defendants further admit, that their interest in said contract, was to commence at the time stated in said bill, being the 7th day of March, A.D. 1828, which was the date of

the contract aforesaid, between said Lippitt and said R. G. Hazard & Co.

And these defendants further admit, that the said R. G. Hazard & Co. assumed on themselves, the payment for all the machinery provided for, in said agreement: and these defendants state, that they have also advanced to the said R. G. Hazard & Co., one half of all the moneys by them assumed to be paid for said machinery (or within a trifle of the amount, being as near an half, as could be ascertained, without a full settlement of all the accounts), and at such times as the said R. G. Hazard & Co. called for the same. These defendants further admit the execution and delivery thereafter, of the deed of assignment, by said R. G. Hazard & Co., to the said Charles Low and Thomas R. Hazard, in trust, for the benefit of the creditors of said R. G. Hazard & Co. at the time, and to the effect stated in said bill. And these defendants further state, that thereafterwards, to wit, on the 4th day of July, A. D. 1829, they made and delivered to said complainant, a deed of assignment of all their property in trust, for the benefit of their creditors, by which deed, all the right of these defendants, being one half, in and to said contract, and to the profits therefrom derived and to be derived, and to the machinery therein mentioned, passed and was conveyed to said complainant. These defendants further state, that as agents of said complainant, or in their own right, or in any otherwise, they never sold to said Almy, nor to said R. G. Hazard & Co. nor to any other person or persons, their interest in said contract, nor as agents of said complainant, nor in their own right, nor in any otherwise, authorized said R. G. Hazard, to sell said interest to said Almy, or to any other person or persons; and, that the right and interest of these defendants, in and to said contract, which by said deed of assignment, passed and was conveyed to said complainant, have never been, to the knowledge or belief of these defendants, conveyed by said complainant, or by any one for him, to any person or persons whatever.

These defendants further state, that said R. G. Hazard & Co., sometime in the winter or spring of 1831, proposed to buy the interest of these defendants in said contract, and to give therefor twenty-seven hundred dollars, to be secured by their notes, endorsed by Thomas R. Hazard, also to pay the balance due from said R. G. Hazard & Co. to the complainant as assignee of these defendants, and also that the said R. G. Hazard & Co. pay the balance due the complainant, as assignee of said Charles Low, on a final settlement of all the accounts between said Low and Fenner and R. G. Hazard & Co.; and these defendants, thereupon, agreed to sell their half of said contract to said R. G. Hazard & Co. upon the condition, that all the above terms were previously complied with: the said R. G. Hazard & Co. being then indebted in a large sum to said Low and Fenner, and said Charles Low, but on investigating the accounts, to ascertain the balance due said Low and Fenner and Charles Low, from said R. G. Hazard & Co., said parties were not able to agree upon the balance due said Charles Low, nor did the said R. G. Hazard & Co. pay or assume to pay any part of said twenty-seven hundred dollars, and the negotiation for the sale was broken off, and entirely failed. Nor have the said R. G. Hazard & Co., at any time since, proposed to renew said negotiation, nor have they since paid or offered to pay, any part of the said twenty-seven hundred dollars, nor have they, to the knowledge of these defendants ever pretended, that they had bought the interest of said defendants in said contract, or set up any title thereto. And the accounts between the said R. G. Hazard & Co. and said Low and Fenner, and between said R. G. Hazard & Co. and said Charles Low, remain to this day unsettled, and the balance due said Low and Fenner, and said Charles Low, from said R. G. Hazard & Co., unascertained and unpaid.

And these defendants further state, that they considered the sum of twenty-seven hundred dollars, offered by said R. G.

Hazard & Co. as less by one thousand dollars or more, than the fair value of their interest in said contract; but they were willing to take that sum, together with a compliance by said R. G. Hazard & Co. with the other terms offered, in order to make a final close of the business, and of their concerns with R. G. Hazard & Co.

And these defendants further answering, state that from the time said Almy began to furnish said Lippitt with cotton under said contract, to the time of the plaintiff's exhibiting his bill of complaint, they have, at different intervals, repeatedly conversed with said Almy in relation to their interest in said contract, in which conversations they always asserted their right to one half of said contract, and offered to said Almy to furnish the cotton under said contract, and told said Almy, they should claim at his hands, one half of the profits, by him received from supplying the cotton under said contract, nor did they, in any conversation with said Almy, or in his presence or elsewhere, deny, that they owned one half of said contract.

And the said Charles Low, answering for himself, denies that the said Rowland G. Hazard was authorized by him, as assignee of said Rowland G. Hazard & Co., to sell to said Almy their (the said R. G. Hazard & Co's.) interest in said contract; and the said Charles Low, further answering for himself, states, he was informed by said Rowland G. Hazard, while said Almy was furnishing cotton under said contract, that he, Almy, did not claim but one half of the contract, and would pay Low and Fenner their half of the profits under the same. And these defendants further state, that when they called on said Almy for an account of said profits, and for payment of one half of the same, said Almy refused to render any account of said profits, or to pay over any part thereof, alleging as his excuse for such refusal, that he did not know who owned the other half of said contract.

Upon the proofs taken, the cause came on for a hearing, and

was argued by *Pratt* and *R. W. Greene* for the plaintiff, and by *Tillinghast* and *Whipple* for the defendants.

The opinion of the Court was afterwards delivered to the following effect:

Story J. The title of the plaintiff is under an assignment made to him by Low & Fenner, dated the 6th of July, 1829, and erroneously stated in the bill to be on the 4th of July, 1829. That assignment conveys to the plaintiff "All the goods, wares, merchandises, and personal property of every kind, belonging to the said late company of Low & Fenner; and also all notes, book accounts, and debts of every kind due them." Now the supposed interest of Low & Fenner, under Hazard & Company, in the Lippitt contract, stated in the pleadings, is neither a note, nor a book account, nor a debt due; and consequently, it did not pass to the plaintiff under the assignment, unless it can be comprehended under the words "personal property of every kind." These words might possibly have been construed to embrace this equitable sub-interest of Low & Fenner in the Lippitt contract, if the words had stood alone. But in the connexion, in which they stand in the assignment, they are manifestly used to signify visible, tangible property, *ejusdem generis* as goods, wares, and merchandises. For if they were designed to embrace every description of personal property in the broadest sense of the terms, the subsequent clause respecting notes, book accounts, and debts, would not only have been superfluous, but impertinent. My opinion, therefore, is, that the words personal property are used in the assignment in a restrained sense, and do not embrace the equitable interest asserted by Low & Fenner in the Lippitt contract. The plaintiff's title, therefore, wholly fails at the threshold of the cause. The answer of Low & Fenner does not help the case in this respect; for it only admits the assignment, as it stands, and pretends to no other or larger conveyance of their interest, than the terms of the assignment purport to convey.

But, although my opinion is thus against the plaintiff on this point, I should be sorry to decide the cause against him solely upon this ground; and I shall, therefore, proceed to the consideration of the other grounds of objection stated in the argument.

The first question is, whether any assignment was in fact made by Hazard & Co. of an interest in the Lippitt contract to Low & Fenner, as stated in the bill. It is certain, that no assignment was made in writing. The bill itself does not directly and positively set up any written contract of assignment signed by the parties. It is true, that there is an unsigned paper appended to the bill; but it is not referred to in the bill as the very contract; nor does the bill assert, that a written contract was intended, and omitted to be signed by the parties by mistake; nor does it ask relief on that account. The bill is not, then, framed for such an aspect of the case; and if it had been, Hazard & Co. must have been made parties to correct the mistake.

The bill, indeed, seems indirectly to rely upon some written contract from Hazard & Co. to Low & Fenner, after the 7th of March, 1828, for it asserts an agreement to have been "made and executed," which terms rather lead to the conclusion, that the plaintiff intended to speak of some writing executed.

But if this difficulty in the frame of the bill, as founded upon a written contract, can be gotten over, still there remains another difficulty, that there is no proof of any such written agreement, as is averred in the bill, either signed or unsigned. The unsigned written paper annexed to the bill, if it could be construed to import a final executed contract, varies essentially in its terms and provisions from that asserted in the bill. So that the proof totally fails, as well as the allegations, in the bill, if construed to refer to a written contract.

If, on the other hand, the bill is to be treated as founded upon a parol contract of assignment, the evidence of what that contract was, in terms or in purport, is so loose, indeterminate, and unsatisfactory, that it would be impossible to act upon it with any

approximation to certainty. I am satisfied, that there was some sort of contract on this subject between Hazard & Co. and Low & Fenner. The weight of evidence clearly establishes that fact. The exception subsequently inserted in the written assignment by Hazard & Co. to Almy, refers to some such contract. But the terms or stipulations of that contract no where appear with any reasonable precision. All the evidence respecting it carries us no farther than to the palpable obscure, *per ignotum ad ignotius.*

I agree, that a contract of this nature might be established by the assent and admission of both the assignors and assignees, by their answers to the bill, if they were parties to it, even though Almy and Lippitt were ignorant of it, and each asserted his ignorance in his answer to the bill. *Ryan* v. *Anderson* (3 Madd. R. 174), seems sufficiently to prove that, even if upon principle it would admit of doubt. But there is no such admission in this case by the assignors and assignees. Perhaps, too, an assignment of an equitable interest in the Lippitt contract might be good, though made by parol, at least if it did not include a stipulation for the personal services of Hazard & Co. The case of *Heath* v. *Hale* (4 Taunt. R. 326), is a strong authority to support it; though I desire to be understood as not giving any absolute opinion on the point. The difficulty lies in the proof *de facto* of any determinate parol contract whatever between Hazard & Co. and Low & Fenner. There is no just ground to call upon a court of equity to enforce a specific performance of a contract between the original parties themselves, where its terms are not clear, definite and positive. *A fortiori*, there is still more difficulty in enforcing it against an assignee of the party, against whom the specific performance is sought.

Besides; it is abundantly proved, that Low & Fenner have, on various occasions, denied, that there was any such contract of assignment between them and Hazard & Co., or that they had any interest in the Lippitt contract.

But if the existence of such a contract of assignment to Low & Fenner were completely established in proof, it would be

difficult for them, or for the plaintiff, as their assignee, now to demand a specific performance of it, or to assert any rights acquired under it, under existing circumstances. A party, to entitle himself to a specific performance of a contract of this sort, after such a lapse of time, should show, that he had been always ready to perform his part of it. Now, Low & Fenner have not shown, that they were ready to perform the contract, as they state it, at all times, before the failure of Hazard & Co., as well as after. They have never supplied, or offered to supply the cotton for the mill to Lippitt. They have never assisted or offered to assist Almy in supplying it. They come now, long after the period for the due supply has passed, and ask for relief, against their own laches and default. Surely they ought not now to be permitted to turn round, and demand of Almy to be let in to the benefits of a contract, which they have expressly repudiated, by denying, in his presence and otherwise that they had any interest therein; and, without bearing any of the hazards of the supply, now to insist upon sharing the profits.

Besides; I am not satisfied, that the assignment to Almy of the contract of Hazard & Co. with Lippitt was not made with the full assent of Low, one of the partners of Low & Fenner; and if it was made with his assent, then it bound the firm. That assignment contains the following clause, to which I have already alluded: "It is further agreed, that if Low & Fenner should redeem their one half of the aforesaid contract by the payment of the drafts drawn on them by R. Hazard & Co. on account thereof, to return half of the aforesaid $5000 to said S. Almy, he relinquishing to said Low & Fenner all claim upon the aforesaid one half of the said contract." Now, when was this redemption by the payment of the drafts to be made by Low & Fenner? Certainly not at an indefinite period. It must have been contemplated by the parties, that it was to be immediately done, or at least within a reasonable time. If Low & Fenner meant to derive any benefit from the clause, it was their duty to proceed forthwith to pay and take up these drafts. They

took no steps for this purpose, until years afterwards; and they must, therefore, be deemed to have waived any rights to be derived therefrom. Indeed, there is no proof, that they ever undertook to act upon any such claim, until a very recent period. The claim, which they now assert through their assignee (the plaintiff) is in effect, to take from Almy half the profits of the Lippitt contract, as it has turned out in the event beneficial, without having incurred any risk whatsoever, or even having enabled Almy to make any demand upon them for any loss, or for any fulfilment of the supposed obligation on their side. There is no reciprocity in the case. They have never entered into any contract with Almy to supply any share of the cotton, or to advance any money towards the completion of the Lippitt contract. Under such circumstances, there is as little equity in this claim of Low & Fenner, as can well be imagined. Indeed, they now press a further claim; and insist upon having the other half profits applied towards the payment of the debt of Lippitt for the machinery of the mill. Upon the actual frame of the bill, there is no pretence for this claim; and in this stage of the cause it is too late to ask for an amendment of it. The proceedings have passed the stage, in which they are amendable.

As to the supposed settlement of the claim of Low & Fenner in the Lippitt contract by Hazard & Co. for the sum of $2700, it is sufficient to say, that it is not made out in point of proof. There were preliminary negotiations on the subject; but they never appear to have resulted in a consummated contract.

But there is an objection to the title of the plaintiff of a more general nature, and which is fatal to it, in whatever form it could be presented. The contract with Lippitt was made on the 7th of March, 1828, and it was to expire in two years, that is to say, on the 7th of March, 1830. The assignment to Almy of that contract did not take place until the 9th of March, 1830, after the term had expired, for which it was to operate. The suit, then, is not maintainable against Almy for any future pro-

fits, unless the contract was renewed by Lippitt with Almy, for the benefit of Low & Fenner, as well as himself. There is not the slightest proof of the renewal of the contract for any such purpose; or, indeed, for any purpose. Nor is there the slightest proof, that Almy ever agreed to pay over to Low & Fenner one half of the profits, which he might obtain by continuing to supply Lippitt upon the terms of the old contract. Lippitt himself utterly denies, that he ever had any knowledge of any contract with Low & Fenner, on the subject at any time; so that he never could have agreed to any. The right reserved, under the original contract between Hazard & Co. with Lippitt, to continue the contract after the expiration of the two years, was a right not reserved to either party, but to Lippitt alone. He was not bound to continue it; and there is no proof, that he intended to continue it. The contract of Lippitt with Almy must be treated as a new contract between them, for it totally dispensed with the personal services of Hazard & Co. And Low & Fenner have not shown any original or derivative title to partake of the benefits or share the losses under that contract.

I have gone over the matters in the present bill farther than was necessary to decide it, from an anxiety to show, that in every view, which I have taken of the case, the plaintiff has no merits. But I desire to be understood as resting my opinion mainly on these three grounds: First, the assignment to the plaintiff, Kendall, does not convey any title to the Lippitt contract, even if Low & Fenner had an interest in it; for the terms of that assignment do not embrace such an interest. Secondly, the contract, as set up in the bill, whether verbal or in writing, is not proved. Thirdly, the original contract with Lippitt expired before the assignment to Almy, and therefore Low & Fenner could claim no title except under a new contract, to which they were parties, and by which they were bound. They have shown no such title. The bill is, therefore, dismissed, with costs.

CIRCUIT COURT OF THE UNITED STATES.

Spring Circuit.

MAINE, MAY TERM, 1836, AT PORTLAND.

BEFORE { Hon. JOSEPH STORY, Associate Justice of the Supreme Court.
Hon. ASHUR WARE, District Judge.

UNITED STATES *v.* JOHN R. VINTON.

The defendant, being a lieutenant in the army of the United States, was commissioned June 30th, 1834, as a captain by brevet, to take rank from September 30th, 1829. *Held*, that the commission took effect retroactively, and that the defendant was entitled to receive the pay of a captain by brevet, for services rendered as captain, after the date last above mentioned.

Where a brevet commission in the army of the United States is conferred upon a party, to take rank from a prior date, the pay and emoluments of the rank conferred follow as an incident from this date, whenever the party has rendered services according to that rank.

ASSUMPSIT on an account annexed and for money had and received. The cause came on to be heard upon an agreed statement of facts, which was as follows:

This is an action of assumpsit, brought by the United States against Captain Vinton, and at his request, to test the validity of his claim to certain brevet pay, to recover two hundred and

four dollars, which sum was drawn by him from the paymaster, but disallowed at the Treasury; and the parties agree to the following statement of facts.

The defendant was commissioned first lieutenant in the United States Army, on the 30th of September, 1819, and served under the said commission until the 30th of June, 1834, when he was commissioned a captain by brevet, to take rank from the 30th of September, 1829. During the periods for which he claims the additional, or brevet pay of ten dollars per month, viz. from the 16th of September, 1830, to the 31st of August, 1831; from the 1st of October, 1831, to the 21st of February, 1832; and from February 26th to July 4th, 1832, he had a captain's command.

The question for the Court is; Did this brevet commission, made and conferred on the 30th of June, 1834, to take rank from the 30th of September, 1829, authorize the defendant to receive brevet pay for services performed in 1830–'31 and '32.

If the defendant was, by said brevet, so authorized, then the plaintiffs are to take nothing by their writ; otherwise the defendant is to be defaulted, and judgment rendered for the plaintiffs for the sum demanded, and costs.

Anderson, District Attorney, for the United States, argued as follows: By act of Congress of July 6th, 1812, ch. 37, sect. 4, the President is authorized to confer brevet rank on such officers of the army as shall distinguish themselves by gallant actions, or meritorious conduct, or who shall have served ten years in any one grade: Provided, that nothing herein contained shall be so construed as to entitle officers so brevetted to any additional pay or emoluments, except when commanding separate posts, districts, or detachments, when they shall be entitled to, and receive the same pay and emoluments which officers of the same grades are now, or hereafter may be allowed by law. By act of 16th April, 1818, ch. 59, "officers of the army, who have brevet commissions, shall be entitled to and receive the

pay and emoluments of their brevet rank when on duty, and having a command according to their brevet rank, and at no other time." By act of 16th March, 1802, ch. 9, sect. 20, "every officer and soldier shall take and subscribe the oath to bear true allegiance" to the country, &c., which oath is required of every soldier on his enlistment, and of every officer on his accepting his appointment. As every promotion is a new appointment (*Marbury* v. *Madison*, 1 Cranch R. 16), the defendant could not act officially under his brevet commission until he had taken and subscribed the oath required by law. The defendant's commission was made and completed on the 30th of June, 1834, to take rank from the 30th of September, 1829; subsequent, of course, to which time he took and subscribed the oath by law required, to authorize him to act under or by virtue of the said commission. The services for which the defendant received pay, rendered, as he maintains, under this brevet commission, were performed between the 16th of September, 1830, and the 4th of July, 1832, two years before this brevet commission was made. Can it be maintained, that the defendant acted under and by virtue of this commission, two years before such commission was in existence? He could not perform the service both under his old commission of lieutenant and under his brevet commission of captain at one and the same time. He acted under one or the other of these commissions. If he performed the service under his old commission, he is, clearly, not entitled to pay for this service under the brevet or new commission. A new commission to do the same thing, determines the old commission. (Jacob's Law Dict. tit. Commission). When did this new commission determine the old commission? When, as regards pay and emoluments, the defendant accepted it, and took and subscribed the oath necessary to qualify him to act under the new commission; and not before. Then, as the defendant was not qualified to act under this brevet commission; for it was not made or conferred until long after the services in

question were performed, he did not perform them by virtue of any power or authority derived from this commission, and cannot claim the increased pay given by this commission for like services. But even if acceptance and the taking the oath of allegiance should not be deemed indispensable; yet the brevet commission could not determine the old commission, until such brevet commission was completed by the signature of the President, and this was two years after the services were performed. In *Marbury* v. *Madison*, it is said, "the applicant has a right to the office or to nothing. He will obtain the office by obtaining the commission, or a copy of it from the record." In the case of Marbury, the officer was nominated, confirmed, and his commission made and completed; yet he could not act in his official capacity, until he received his commission or a copy of it, and was duly qualified under such commission or copy, by taking the qualifying oath. Had Marbury assumed to act as a magistrate before he had obtained his commission, or a copy of it, and before he had taken the requisite qualifying oath, would such acts have become legal and valid, by his subsequent possession of the commission and a subsequent qualification to act under it? Could Marbury have enforced the payment of fees for such assumed official acts, by the production of a commission bearing date before, but under which he was not qualified to act, until after the services were performed? If not, how can the defendant claim this money, when even his commission was not made until long after the performance of the service for which he received the money? The act of Congress contemplates services to be performed, and not services already rendered. "Officers who have brevet commissions, shall be entitled to receive the pay and emoluments of their brevet rank, when on duty and having a command, according to their brevet rank, and at no other time;" but should the construction contended for by the defendant prevail, so as to cover past services, he will receive pay for "time other" than when he held such brevet

commission. By the act of 1812, ch. 137, sect. 4, the President is authorized to confer brevet rank; and by the act of 1818, ch. 59, sect. 2, "no brevet commission shall hereafter be conferred without the advice and consent of the senate." As it is not imperative on the President to nominate, or on the senate to confirm, this brevet might have been delayed twenty years, and then defendant might have been brevetted a colonel, to take rank ten years prior to the date of his commission. Could the defendant, under such circumstances, go back with his account, and charge pay and emoluments as a colonel for such periods as he, as a lieutenant in fact, might have been left in command of a separate post?

Brevet rank is not conferred on officers of the navy; but, to reward gallant deeds, commissions are often conferred, to take rank from an anterior day. Suppose a lieutenant had taken command of the ship, his captain being sick or disabled, and for his gallant conduct in action he should subsequently be made a captain, to take rank on the day of the action in which he distinguished himself, could he go back, and draw pay and prize money as a captain?

By article 75 of the Rules and Articles for the Government of the Army, act of 1806, ch. 20, "No officer shall be tried but by general court-martial, nor by officers of inferior rank, if it can be avoided." Suppose the officers composing a court-martial, to try a colonel, were all of inferior rank, while a court might, without difficulty or delay, have been organized, composed of officers of the rank of the accused, as required by law; and the accused should object to a confirmation of the sentence of such court, for this reason; but before a decision was made upon the objection to the confirmation of the sentence, the officers objected to, on account of their inferior rank, should receive commissions of colonels, to take rank prior to the organization of said court-martial, would these subsequent commissions cure the defect? If not, then can a subsequent commission give a right to

increased pay for past acts, when it cannot confer the increased power to do those acts, or rather to make those acts valid. The case of Captain Bache, of the army, was in all respects like the one under consideration. The Attorney General, to whom that case was submitted, in his official opinion, given on the 5th of January, 1835, says, " to come within the law of 1812, the officer must have been brevetted; and to be included in that of 1818, he must have a brevet commission. Captain Bache's rank having been carried back to a date prior to the period for which he now asks brevet pay, he would seem to have an equitable claim for the difference charged by him, but his only remedy is by application to Congress."

By the act of 1813, ch. 137, officers, who have served ten years in one grade, may be brevetted. The only object and intent of conferring rank anterior to the date of the commission is, evidently to decide the officer's relative place and command among his brother officers, and to fix the beginning of another ten years, when he may, by the act, receive another brevet; otherwise a commission would have said to take pay as well as rank from an anterior day. Congress evidently intended, by the act of 1818, by requiring the consent of the Senate to these appointments, to guard not only against too great an increase of these commissions, but also against increase of pay under them, by expressly refusing pay, except when the command was according to the rank. The words of the act are too plain and unambiguous to admit of a doubt as to the intention of Congress, and it is contended that the United States must prevail, unless by construction the defendant shall be made to have held this brevet commission two years before it was made, and when in truth and in fact he held no such commission.

Vinton, pro se, argued as follows:—The question seems principally to turn upon the single point, whether the validity of any commission takes origin from its *date*, or from some other period. The Attorney General of the United States is of opin-

ion, that in the case of a brevet commission, and with regard to the pay and emoluments pertaining to it, this period is "when it is conferred." But the law is simply declaratory of the privileges and restrictions of brevet rank. The phrase, "officers who have brevet commissions," seems to be only another mode of saying, officers with brevet rank; captains by brevet, or majors by brevet, &c. &c.; and could not have been meant to imply, that in order to ensure to an officer the emoluments of his brevet rank, he must necessarily have the parchment commission in his pocket. There is nothing, in a fair reading of the law, however certain passages may be emphasized, which places brevet commissions on any ground distinct from other commissions, with respect to the date and origin of the immunities conferred by them.

The decision of the Attorney General is unprecedented. Repugnant as it is to the feelings of the defendant to appear as a controvertist with his Government, yet it cannot be surprising, that he should appeal from a judgment at variance with all former decisions, opinions and usages, which have prevailed, both in the army and in the departments at Washington, in similar cases. The rule has hitherto been, invariably, that all the immunities of a commission have their initial virtue from its date. The immunity of rank is explicitly declared to obtain from its date upon the face of the instrument, and if it were usual to discuss the matter of pay in such a document, it can scarcely be doubted, that it would be made to correspond. The time of a commission being "conferred," or issued, has always been considered as a matter of little or no importance.

By confirming an appointment with an anterior date, it is a virtual acknowledgment, that it ought to have been conferred at that date. Commissions of all kinds must necessarily be dated back. No one can be nominated, confirmed, and have his commission executed, on the day it falls due. Every advantage of the back date has therefore always been conceded. Whenever,

in the ordinary course of service, an officer is promoted to an advanced grade, he draws the difference of pay, on the first official announcement of the promotion, though the confirmation of it could not take place until a subsequent period. Some thirty brevet second-lieutenants are annually appointed in July, who are not confirmed until the ensuing session of Congress; yet they receive the pay of their brevet rank for the intervening time, although, in the view of the Attorney General, they are not then "brevetted," and have not a "brevet commission." In every instance, of civil or diplomatic appointment, the same usage is believed to prevail.

In the view of right and justice, even the Attorney General admits, that the defendant has an "equitable claim." The law evidently intended to confer additional emolument for additional service rendered. It is not denied, that its requisitions, in this respect, were fulfilled. The law guarantees brevet promotion, after ten years faithful service in one grade. It is not denied, that this probation was accomplished. The commission was, therefore, executed and delivered, conferring rank from a date strictly conforming to the period when it became due. The Senate, for purposes of their own, deferred action on its confirmation, but not, it is presumed, with any design to deprive it of its immunities. On the contrary, by dating it back, they virtually acknowledged and sanctioned the period at which it should have been conferred, and from which all its immunities should date. If any wrong ensue from the delay, the Government cannot justly take advantage of that wrong to the prejudice of the citizen.

It may be fairly concluded, then, that unless the law has expressly declared, that the emoluments due under a brevet commission are to be allowed only from the time of its confirmation by the Senate, or its promulgation by the Executive; unless brevet commissions are in this manner to be explicitly excepted from the general and prevailing rule in regard to other com-

missions, all the immunities pertaining to them should be coeval. The law has made no such express exception. Consequently the pay drawn by the defendant as brevet captain, "having a command according to his brevet rank," was due to him under the statute, and should be allowed at the Treasury.

STORY J. The defendant, Captain Vinton, appears, by the statement of facts, to have been commissioned as a lieutenant in the army on the 30th of September, 1819; and he served under that commission until the 30th of June, 1834, when he was commissioned by the President, by and with the advice and consent of the Senate, as a captain by brevet, to take rank from the 30th of September, 1829, the time when his ten years' service expired. He claims, and has received, the additional pay of ten dollars per month, as captain by brevet, for different periods of time between September, 1830, and July, 1832, during which periods he had the command of a captain by brevet. The United States insist, that this additional pay has been received and retained against law. And the question now is, whether Captain Vinton has rightfully received it, and can rightfully retain it, according to the existing laws on this subject.

The act of the 6th of July, 1812, ch. 137, provides, That the President shall be authorized "to confer brevet rank on such officers of the army as shall distinguish themselves by gallant actions, or meritorious conduct, or who shall have served ten years in any one grade." The act of the 16th of April, 1818, ch. 59, provides, "That the officers of the army, who have brevet commissions, shall be entitled to and receive the pay and emoluments of their brevet rank, when on duty, and having a command according to their brevet rank; and at no other time."

It is plain, that the additional pay and emoluments of brevet rank cannot be claimed, until the party has received his brevet commission, and is properly qualified to act under it. And if there were nothing more in the present case, there would be no

room for doubt or controversy. But the true question here is, not whether the party must have a brevet commission (for Captain Vinton has that); but whether his commission takes effect only from its actual date; or, by relation back, takes effect at and from the 30th day of September, 1829, from the terms in the commission, that he is thereby "to take rank from the 30th of September, 1829." If it is to take effect from this last period as to rank, it is difficult to perceive, why the pay and emoluments of the rank do not follow the rank itself, according to the provisions of the act of 1818, ch. 59.

It has not been denied, and, indeed, it is tacitly admitted by the argument, that the President, by the advice and consent of the Senate, has authority to confer brevet rank from a period antecedent to the actual appointment and commission. That point, therefore, is fairly out of the case; and, indeed, we must admit, that Captain Vinton was regularly and honorably entitled to the rank from such antecedent period, since it was actually conferred upon him by the proper authority.

It appears to me, that the commission does not take effect solely from and after its date; but in this instance retroactively, it has effect from and relation to the 30th of September, 1829. I hold this to be the natural, nay, the necessary construction of the words of the commission. Unless this construction is given to the instrument, we in fact strike out of it the words, "to take rank from the 20th of September, 1829," a liberty, which no court of justice can be justified in assuming. If the words, then, are to have any meaning, they confer on Captain Vinton the brevet rank of captain from that time. If they confer on him that rank from that time, then they confer on him also the pay and emoluments of that rank, when he is on duty, and has a command according to that rank, from and after that time. It seems to me, that the pay and emoluments are necessarily attached to the rank; and that if the rank existed from September, 1829, and the duty and command also existed, then the pay

and emoluments followed of course. It is admitted, that, in equity, he ought to receive the pay and emoluments; and I think, he is equally so entitled at law, upon the plain intent of the commission, and of the act of Congress regulating the pay and emoluments.

The whole argument, on behalf of the United States, rests upon the ground, that the commission can operate only from and after its date, to confer brevet rank and pay *in futuro*. But the very terms of the commission contradict that, as to rank; and if so, where is the ground for a distinction between the rank, and the pay and emoluments? The act of Congress states none. The commission states none. I confess myself unable to find any. If we construe the commission as a commission creating Captain Vinton a captain by brevet from the 30th of September, 1829, the whole difficulty in the case vanishes. If we adopt any different construction, we reject the words of the instrument, or we deny them any meaning. They become, *vox et præterea nihil*.

Having said thus much, the subject is, with me, exhausted. My judgment is, that the United States ought to take nothing by their suit, and that judgment ought to be entered for the defendant.

The District Judge concurs in this opinion; and therefore let judgment be entered accordingly.

CIRCUIT COURT OF THE UNITED STATES.

Spring Circuit.

NEW HAMPSHIRE, MAY TERM, 1836, AT PORTSMOUTH.

BEFORE { Hon. JOSEPH STORY, Associate Justice of the Supreme Court.
Hon. MATTHEW HARVEY, District Judge.

UNITED STATES *v.* SAMUEL CUSHMAN, ADMINISTRATOR.

Where a judgment was obtained upon a joint and several bond, for duties at the Custom House, in a joint suit against all the obligors; and afterwards, one of the obligors died; it was *held*, that no action at law lay against the administrator of the deceased obligor, but only against the surviving judgment debtors.

Held, also, that the Acts of New Hampshire of 1808, and 1830, on the subject of the liability of administrators, upon joint contracts and joint demands against the estate of a deceased debtor (when the other debtor survived), do not apply to a suit on a joint judgment, whatever might be the case, as to a suit on the original contract or demand.

Where the secretary of the treasury releases an insolvent debtor, under the Acts of Congress, upon the condition of the assent of his sureties to the release, without prejudice to their liability, that assent must be by the parties, if living, and if dead, by their personal representatives. An assent by the *heir* of a surety is not sufficient.

DEBT on judgment. The parties agreed to a statement of facts, as follows:

This is an action of debt, founded upon a judgment rendered by the Circuit Court, for the district of New Hampshire, on 8th

of October, A. D. 1829, in favor of the plaintiffs, against Willis Barnabee, John N. Sherburne, and John Abbot—for the sum of $918,53 debt, and $27,06 cost. The said judgment was rendered upon a bond, given for the security of duties upon goods imported. The defendant, Samuel Cushman, is administrator upon the estate of John Abbot. The writ in this case, together with the copies of the judgment above named, are made a part of this case. In May, A. D. 1834, the aforesaid Willis Barnabee, applied for a discharge from the above named judgment, in pursuance of the provisions of certain insolvent laws of the United States. A hearing was had before the commissioners, and the result of this investigation, was forwarded to the secretary of the treasury department. After which hearing and report, the secretary of the treasury, forwarded to said Barnabee a letter, which is made a part of this case. On the same 18th of June, the secretary of the treasury forwarded to the district attorney of New Hampshire, a discharge, which made a part of this case. The said discharge now is, and ever has been, retained by the district attorney.

On 19th November, 1834, John N. Sherburne above named, together with John E. Abbot, son and sole heir of John Abbot, who deceased after the rendition of the afore described judgment, signed a document, showing their assent to the discharge of the said Barnabee—which document was filed in the treasury department on 10th April, A. D. 1835. On 26th August, A. D. 1829, Willis Barnabee surrendered to the Custom House, two debenture certificates—one for the sum of $341,40, the other for the sum of $50,66—for the benefit of the government; and endorsed on each of them, a receipt for the amount thereof, which several sums, amounting to $392,06 at the time of rendering the aforesaid judgment, were not, and have not since been allowed to said Barnabee. The above named defendant, Cushman, has filed a general demurrer. The said Sherburne has pleaded *nul tiel record*, and also satisfaction for the sum of $392,06—the

said Barnabee has pleaded a discharge under the insolvent laws of the United States.

Upon the above case, it is agreed, that such judgment shall be rendered as pertains to law. It is further agreed, that if the Court are of opinion the action cannot be maintained against the three defendants, but can be against Cushman as administrator, the plaintiffs are at liberty to become nonsuit, as to the other two defendants, and may amend so as to take judgment against Cushman alone, for such sum as the Court may direct. The estate of John Abbot has been represented insolvent, and is probably so in fact.

Hale, District Attorney, for the United States. *C. B. Goodrich* for the defendants.

Story J. Upon this statement of facts, I have no doubt, that the suit is not maintainable against all the defendants. It is the case of a joint judgment against three; and the suit is brought against two of the judgment debtors, who survive, and the administrator of the third judgment debtor, who is dead. The general doctrine of the common law unquestionably is, that the judgment survives against the surviving debtors only, and is gone as to the deceased debtor. The administrator is sued *in autre droit;* but it is clear, that he is not suable in that capacity jointly with the other debtors.

But the parties have agreed, that, if necessary, the writ and declaration may be amended, so as to become the case of a several suit against the administrator of the deceased debtor upon the judgment. And the question is thus presented, whether such a suit could be maintainable against him separately upon the joint judgment. I am of opinion, that it could not be so maintainable. As the judgment is joint, all the parties, who are living, and within the process of the Court, must be joined in a suit upon that judgment. So the Supreme Court decided, in the case of *Gilman* v. *Rives*, 10 Peters R. 298. But, in truth,

this is not the most pressing part of the objection. The judgment survives against the living judgment debtors; and can in no mode whatsoever, known to the common law, be enforced against the administrator of the deceased debtor. As to him, in its character as a judgment, it is *functus officio*.

The Statutes of New Hampshire have not in any manner, helped this matter. The Act of 1808 (Revised Laws of 1830, p. 65), applies only to suits on joint contracts, while they remain such, and not to judgments. It does no more than the original bond has provided in the present case; that is, it makes the contract several, as well as joint; so that it is suable as a several contract against the personal representatives of each deceased joint contractor. But the present is not a suit upon the original bond, as a several contract; but upon the joint judgment. Whether, after a joint judgment upon a joint and several contract, a several suit can be maintained upon the same contract severally against one of the debtors, or his personal representative; or whether it is merged in the judgment, is a question, which we need not meddle with in this case; for it does not arise.[1] The Act of 1822, § 12 (Revised Laws of 1830, p. 336), does not seem intended by its terms to go farther than the prior Act of 1808. It provides, "that the estate of any person deceased, and the executor or administrator thereof, shall be liable for *joint demands* against the deceased, and any other person, in the same way and manner, as they would be liable, if such demands were several, as well as joint; unless it appear to have been the intention of the parties, that the demand should survive only against the longest liver." It is difficult to perceive, how this language could apply to any other cases, except cases of contract voluntarily entered into by the parties, were they had an

[1] See on this point, *Sheehy* v. *Mandeville*, 6 Cranch R. 253. *Lechmere* v. *Fletcher*, 1 Cromp. & Meeson R. 634, 635.

option to make their responsibility joint and several, or otherwise; and where the right of suit is still resting upon the original contract. It cannot, without violence to the terms, be applied to judgments; for no such thing is known, at the common law, as a joint and several judgment.

This view of the nature and operation of the Statutes of New Hampshire renders it wholly unnecessary to consider another point, which has been suggested by the argument; and that is, whether a contract made with the United States for the payment of duties, under the revenue laws of the United States, is, or can properly be deemed a local contract, to be governed by the State laws. Whenever that point arises directly in judgment, it may become necessary to consider the grounds and extent of the decisions of the Supreme Court, in *Cox* v. *United States* (6 Peters R. 172, 203), and in *Duncan* v. *United States* (7 Peters R. 435, 449).

It is quite a different question, whether, upon a bill in equity properly framed, the United States might or might not have redress against the administrator. That would depend upon principles and facts wholly incapable of being properly considered in a court of law. In such a suit, the question would be presented, whether the debenture certificates ought not to be first deducted from the debt.

As to the other point, which, it is suggested, the case was intended to raise, whether the consent of John E. Abbot, the son and heir of the deceased, to the discharge of Barnabee, was a compliance with the condition of the discharge of Barnabee, provided for by the secretary of the treasury in his official instrument in the case; I am of opinion, that it was not. The consent must have been given by the party himself, if living; if not living, by his personal representative; for the latter only was capable of acting in the premises, so as to bind the estate of the deceased generally. The son, though heir, was in the sense of law a mere stranger, having no privity in contract or

responsibility, by which he could bind the general assets of the deceased. But at most he could bind himself, only so far as real estate should descend to him from the deceased.

My opinion, therefore, is, that, at law, upon the statement of facts, judgment ought to be entered for the defendants, that the plaintiffs take nothing by their writ.

The District Judge concurs in this opinion, and therefore let judgment pass for the defendant.

CIRCUIT COURT OF THE UNITED STATES.

Spring Circuit.

MASSACHUSETTS, MAY TERM, 1836, AT BOSTON.

BEFORE { Hon. JOSEPH STORY, Associate Justice of the Supreme Court.
Hon. JOHN DAVIS, District Judge.

JOSIAH WOOD JR. *v.* SAMUEL MANN AND OTHERS.

The general rule of equity proceedings is, that after publication of the testimony, no new witnesses can be examined, and no new evidence can be taken, unless where the Judge himself, upon or after the hearing, entertains a doubt, or when some additional fact, or inquiry is indispensable to enable him to make a satisfactory decree.

A witness may be examined to the mere credit of the other witnesses, whose depositions have been already taken and published in the cause, but he will not be allowed to be examined, to prove or disprove any fact, material to the merits of the case.

The time for publication will be enlarged, or more properly, the time for taking the testimony will be enlarged, after publication has passed, though not in fact made, according to the rules of the Court, provided some good cause therefor is shown upon affidavit, as surprise, accident, or other circumstances, which repels any imputation of laches. The affidavit is indispensable, except in a case of fraud, practised by the other party.

Exhibits in the cause may be proved after publication, and even *vivâ voce* at the hearing, when there has been an omission of the proof in due season, and they are applicable to the merits.

Fresh interrogatories and a re-examination have been permitted after publication, where depositions have been suppressed from the interrogatories

being leading, or for irregularity, or where it has been discovered, that a proper release has not been given, to make a witness competent.

Semble, that new testimony may be taken after publication to facts and conversations occurring after the original cause is at issue, and publication has passed.

The Court may, in the exercise of a sound discretion, allow the introduction of newly discovered evidence of *witnesses* to facts in issue in the cause, after publication and knowledge of the former testimony, and even after the hearing. But it will not exercise this discretion to let in merely cumulative testimony.

The same rule holds in cases of bills of review, and supplementary bills in the nature of bills of review.

Semble, that the rule ought to be confined to cases of the discovery of new evidence of a *documentary* nature, and the testimony of witnesses, necessary to substantiate this.

BILL in equity, to set aside a certain conveyance made by the complainant to one John R. Adams (a defendant), asserted to have been procured by fraud and imposition, upon the plaintiff. The case has already been twice before the Court, on interlocutory motions (S. C. 1 Sumner R. 506, 578), and was set down for a hearing, at the next September adjournment of the Court.

A petition was now filed on behalf of the plaintiff, to take the testimony of a witness, to be used in the cause, at the hearing, upon the ground, that it was material testimony, going to the merits of the case, as put in issue, and which has been very recently (within a few weeks) discovered by the plaintiff. The petition was supported by the affidavit of the plaintiff, as to the recency of the discovery of the evidence, and by an *ex parte* deposition, given by the witness himself of the facts, which he can establish, consisting of confessions made by the defendant, Mann, to the witness about five years ago, and before the institution of the present suit. Publication of the evidence in the cause passed nearly a year ago; the parties have long been in full possession of it; and indeed, for their convenience it was printed, and open to the freest inspection.

The question was on the admissibility of this evidence, at this stage of the cause; and it was argued by *B. Rand* for the plaintiff; and *F. Dexter* for the defendants.

Story J. Of the materiality of the testimony now proposed to be taken, no doubt can be entertained. It goes to establish many of the leading points of fact in controversy between the parties; and if not vital in the cause, it is on all sides admitted to have a most stringent force and pressure. It is under circumstances, so rare and so novel, that this Court is called upon to decide one of the most important and delicate questions of practice; than which, indeed, few, if any, can be presented, better deserving of deliberate consideration, and striking deeper into the foundations of equity jurisprudence. It is upon this account, that I have taken time to examine the whole subject, with all the aids, which could be derived from the labors of counsel and my own auxiliary researches; feeling, as I do, an anxious desire to perform on the present occasion, exactly what upon the most careful survey of principles and authorities, it is my duty judicially to perform.

The general rule in equity proceedings is, that, after publication of the testimony, no new witnesses can be examined, and no new evidence can be taken. This rule is at least as old as the time of Lord Bacon, among whose Ordinances in chancery, we find the following: "No witnesses shall be examined after publication, except by consent, or by special order *ad informandum conscientiam judicis;* and then to be brought close sealed up to the Court to peruse or publish, as the Court shall think good." The true exposition of the latter qualification of this rule would seem to be, that the new evidence to inform the conscience of the Judge, should not be taken, but upon or after the hearing, when the Judge himself entertains a doubt, or when some additional fact or inquiry is indispensable to enable him to make a satisfactory decree. So was the doctrine held in

Newland v. *Honeman* (2 Ch. Cas. 74); and it is strongly fortified by what fell from Lord Manners, in *Savage* v. *Carroll*, (2 Ball and Beatt. R. 283, 284), and by the Master of the Rolls, in *Parker* v. *Whitby* (1 Turn. & Russ. 366). Except for such purposes and under some special order of the Court itself at or after the hearing, no such testimony, taken after publication, is now deemed admissible, at least unless under extraordinary circumstances, under the rules. The practice of taking such testimony before the hearing, and keeping it sealed up to be used by the Court at the hearing, if it should be deemed meet, is said by the text-writers to have fallen into disuse, and not to have been in practice for more than a century.[1]

There is an old case reported in Cary's Rep. 83, which shows, what the old practice was; and I quote it in the very words of the report. "Upon affidavit made by the plaintiff, that since publication granted he had divers witnesses (setting down their names) come to his knowledge; therefore ordered he may examine them before the examiner, *ad informandum conscientiam judicis.*" No other circumstances are stated; and therefore it is impossible to know, what the facts were, or whether the other testimony taken had been actually seen by the plaintiff.

The general rule is founded in the obvious public policy of suppressing perjury, and the fabrication of evidence, to meet the exigencies of the cause, after the full bearing and weight of the testimony are understood by all the parties. If, under such circumstances, the parties were permitted to supply the actual deficiencies of the evidence from time to time, as they should be found out, there would be strong temptations to corrupt, and insidious practices to obtain, new evidence; and there would be a premium held out for delays and omissions of diligence in

[1] Hinde's Practice, 316. Beames's Orders in Chanc. 33, note (117) and (118). *Dalby* v. *Mace*, Tothill, 191. Carey R. 83. Wyatt Prac. Register, 354, 355. *Willan* v. *Willan*, 19 Ves. 592.

taking the evidence, until the whole strength of the adversary's cause was disclosed. Courts of equity, from considerations of this sort, have always been disposed to uphold the rule with a firm and rigid exactness.

Lord Eldon, in *Whitlocke* v. *Baker*, 13 Ves. 511, said: "This Court will not enlarge publication, without a very special case made. The party's want of knowledge of the rules of proceeding, and want of attention in his solicitor, are not sufficient. The rules of justice are founded in great general principles, not to be broken down by such circumstances." Lord Macclesfield, in *Cann* v. *Cann* (1 P. Will. 727), laid down the doctrine in more emphatic terms. "The precedent methods (said he) of this Court were, that, after publication is passed, and the purport of the examinations known to the parties, neither side is allowed, though they come recent, to enter into part examination of the matters in question, since otherwise there would be no end of things, and such a proceeding would tend to perjury, as well as vexation."

Exceptions, however, have been admitted to the general rule; and to these our attention will now be directed, in order to ascertain, how far they are applicable to the circumstances of the case before the Court. The exceptions will be found for the most part to turn upon grounds entirely consistent with the policy of the general rule, and in no manner trenching upon its justice or inconvenience. At the same time, they exhibit in a marked manner the reluctance of the Court to break in upon the general uniformity of the practice, except under very special circumstances.

It will not be necessary to go over the authorities at large; for they do not present any general diversity of judgment, requiring comment or criticism. They rather arrange themselves into classes, in each of which every successive Judge has shown a solicitude to keep within the limits prescribed by his predecessors.

The first class of exceptions is, that of the examination of witnesses to the mere credit of the other witnesses, whose depositions have been already taken in the cause. This is the ordinary practice, and is done upon articles or objections filed.[1] But, then, in these cases, the general interrogatory only, whether he (the proposed witness) would believe the other on his oath, (which is the usual form of putting the interrogatory in England, and differs widely from that, in which it is usually put in America),[2] is that, upon which the new examination is allowed, unless under very special circumstances. And there is this close limitation upon such special circumstances, that the interrogatory shall not be to any facts put in issue in the suit; but only to such facts, as merely touch the credit of the witness. This doctrine was expounded very fully, by Lord *Eldon*, in *Purcell* v. *McNamara* (8 Ves. 324, 326), and *Wood* v. *Hammerton* (9 Ves. 145), *Carlos* v. *Brook* (10 Ves. 50), and *White* v. *Fussell* (1 Ves. & Beam. 153); and it was recognised and acted upon by Mr. Chancellor *Kent*, in *Troup* v. *Sherwood* (3 John Ch. R. 558), where he critically examined the leading authorities. But, what is most important in its bearing on the present case, is the absolute refusal of the Court in these cases to allow the witness to be contradicted as to any fact, which he had sworn, touching the merits of the matters in issue between the parties. "If," (said Lord *Eldon*, in *Purcell* v. *McNamara*), "for instance, the fact is material to the merits of the case, and the witness has sworn to it, there is great danger of bringing other witnesses, under color of discrediting that witness, to prove or disprove such fact."[3]

Another class of exceptions is, where the application is made

[1] Beames's Ord. in Ch. p. 32, § 72. Id. p. 187, § 80.

[2] See 1 Starkie on Evid. 182 (2d edit. London 1833). *Walmore* v. *Dickenson*, 2 Ves. & B. 267, 268. *Carlos* v. *Brook*, 10 Ves. R. 50.

[3] See Gilb. For. Rom. 147. *Smith* v. *Turner*, 3 P. Will. R. 413.

to enlarge the time for publication, or more frequently to enlarge the time for taking the testimony after publication has been, in form, though not in fact, made, according to the rules of the Court. To such applications, whenever they will cause any delay in the cause, the Court does not listen without some good cause shown upon affidavit; such as surprise, accident, or other circumstances, which repel any imputation of laches.[1] And in all cases of this sort before the application is allowed, the party and his clerk in court, and solicitor, are required to make oath, "that they have neither seen, heard, read, nor been informed of any of the contents of the depositions taken in that cause; nor will they see, hear, read or be informed of the same till publication is duly passed in the cause."[2] And this affidavit is so important, that the Court will never dispense with it, except in a case of fraud practised by the other party, to evade the rule; as was the case in a memorable instance in Lord Somers's time, stated by Ch. Baron *Gilbert* (Gilb. For. Rom. 146). Lord Eldon, in commenting on the affidavit, and the strictness of the rule requiring it, said; "That it is founded upon this, that no more dangerous mode of proceeding can take place than permitting parties to make out evidence by piecemeal, and to make up the deficiency of original depositions by other evidence."[3] In the same case, where a motion was made, the effect of which was to introduce new evidence to be taken after the cause had been set down for a hearing, he added; "The next ground for this motion is the materiality of the farther evidence, which it is supposed can be given. If that could be represented as most highly material, I dare not trust myself with laying down a pre-

[1] See Gilb. For. Rom. 124. 1 Harris. Ch. Pr. by Newland, ch. 43, p. 285, 287. See also *Watmore* v. *Dickinson*, 2 Ves. & B. 267, 268. *Cutler* v. *Gremer*, 6 Madd. R. 254.

[2] Gilb. For. Rom. 146. See also Anon. 1 Vern. R. 253. Hinde's Pract. 384, 385.

[3] *Whitelocke* v. *Baker*, 13 Ves. R. 512.

cedent, that would authorize attempts to bring forward an application in every case, where even after a cause had been set down the party might see, that it would not be convenient to hear the cause upon the evidence, on which he originally intended to put it. The danger from that would be enormous."[1] The only material abatement of the force of this language, as applied to the present case, is, that was spoken in a case not of newly discovered evidence, but of known evidence alleged to have been improperly and irregularly taken. Mr. Chancellor *Kent*, in *Hamerslie* v. *Lambert* (2 John. Ch. R. 432), reviewed the authorities, and sustained the doctrine, as above stated, with all the weight of his own great opinion.

Another class of exceptions is the proof of exhibits in the cause, after publication, and even *vivâ voce* at the hearing, where there has been an omission of the proof in due season, and they are applicable to the merits. *Gilbert*, in his Forum Romanum (p. 183), takes notice of this practice, and says, "Upon this rehearing any exhibit may be proved *vivâ voce*, as upon the original hearing. But no proof can be offered of any new matter, without special leave of the Court, which is seldom granted." The like doctrine is fully supported in many cases.[2]

Another class of exceptions is, where depositions have been suppressed, from the interrogatories being leading, or for irregularity, or where it has been discovered, that a proper release has not been given to make a witness competent; in every such case, from the obvious necessity, and in furtherance of justice, fresh interrogatories, and a re-examination have been permitted.[3]

[1] *Whillock* v. *Baker*, 13 Ves. R. 512.

[2] See *Wight* v. *Pilling*, Prec. Ch. 496. *Dashwood* v. *Lord Bulkeley*, 10 Ves. R. 238. *Buckmaster* v. *Hanop*, 13 Ves. 458. *White* v. *Fussell*, 1 Ves. & B. 153. *Higgins* v. *Mills*, 5 Russ. R. 287. *Wyld* v. *Ward*, Younge & Jer. 384. *Williams* v. *Goodchild*, 2 Russ. R. 91. *Dale* v. *Rosebelt*, 6 John. Ch. R. 256.

[3] *Lord Arundel* v. *Pitt*, Ambl. R. 583. *Perry* v. *Sylvester*, 1 Jacob R. 83. *Curre* v. *Bowyer*, 3 Swanst. R. 357. *Sandford* v. *Paul*, 3 Bro. Ch. R.

In the case of *Sandford* v. *Paul* (2 Dick. R. 750; S. C. 3 Bro. Ch. R. 370, and 1 Ves. Jr. R. 398), it appears from Mr. Dickens's Reports, that the subject was a good deal examined, and many authorities are cited by the reporter to show, that the strictness of the rule had been relaxed in special cases of this nature.

All these classes of exceptions stand upon peculiar grounds, and steer wide from any of the just objections, which have been urged against the introduction of new evidence, after the pressure of the evidence, as taken, is fully known to both parties. The qualifications and limitations accompanying these exceptions demonstrate, in the most full and satisfactory manner, that the design of upholding the policy of the general rule constitutes the main ingredient in the view of the Court in acceding to, or refusing every application. If the existence of the evidence is fully known at the time of the taking of the depositions, and if it is not purely the case of written evidence, it will be difficult to find any uniform relaxation of the general rule, that after publication passed, and the depositions have been seen, no new evidence shall be admitted.

The question, then, is reduced to this, whether new evidence by witnesses, which has been discovered since publication has passed, and the contents of the depositions been made known, can, consistently with the general objects and purposes of the rule, be allowed? Now, this is partly a matter of authority, and partly of principle. And I fully agree, that, if upon a rehearing, or upon a bill of review, or upon a bill in the nature of a bill of review, the evidence of new witnesses ought to be let in, then it ought now to be allowed, to avoid circuity of remedy and increased expenses in litigation. If, on the other hand, it would not, under such circumstances, be allowed; and

370. S. C. 1 Ves. Jr. R. 398. 2 Dick. R. 750. *Spence* v. *Allen*, Prec. Ch. 493. *Shaw* v. *Lindsey*, 15 Ves. R. 380. *Cox* v. *Allingham*, 1 Jacob R. 337, 341, 343. *Collen* v. *Mince*, 2 Vern. R. 472.

if, in analogous cases, it has been rejected; and if no direct authority can be shown in favor of the motion; then, since it must be a case of not infrequent occurrence in practice, each of these considerations will furnish strong objections against the motion.

I have said, that if upon a rehearing, or a bill of review, the plaintiff would be entitled to the benefit of this testimony, he ought now to be entitled to it; and, as it is applicable to points already in issue, there is no need of a supplementary bill. In this view of the subject I feel myself strongly fortified by the language of Lord *Eldon* in *Milner* v. *Lord Harewood* (17 Ves. R. 148), "There is" (said he) "no recollection of a supplemental bill of this kind; and if a new practice is to be settled, the strong inclination of my opinion is, that when the particular case arises, where either conversation or admission of the defendant becomes material after answer or replication; or, as in this instance, after examination of witnesses in the original cause; or if a new fact happens after publication, which it is material to have before the Court in evidence, when the original cause is heard, it is much better, if the examination of witnesses, if required, should be obtained upon a special application for the opportunity of examining, and that the depositions may be read at the hearing; or if discovery is required, that the party should file a bill for that purpose merely; and if relief is required, that the answer comprehending the discovery, should be read at the hearing of the original cause."

This language would certainly seem to show, that there were cases, in which new testimony might be taken after publication, at least as to facts and conversations occurring after the original cause is at issue, and publication passed. Here, however, the application is to admit newly discovered evidence of confessions before the bill was filed. In *Willan* v. *Willan* (19 Ves. R. 591; S. C. Cooper Eq. R. 291), the same great judge said, "It is perfectly established, that after publication, previous to a decree,

and the depositions have been seen, you cannot examine witnesses farther without leave of the Court, which is not obtained without great difficulty; and the examination is generally confined to some particular facts. At the hearing of the cause, the Court sees all the evidence; and if, instead of deciding upon inference, it directs inquiries, the decree directing these inquiries is, in truth, the leave of the Court given for farther examination of witnesses upon the very point." It is difficult to ascertain the precise limitations, which ought to be applied to language so general; and whether the learned Judge meant merely to advance the suggestion, that the Court might, to satisfy its own conscience, direct new evidence to be taken at or after the hearing; or whether he meant to state, generally, that new testimony might be taken, upon a case made to the Court, at any time after publication, and before the hearing. Unfortunately, the case did not call for a more explicit declaration of opinion. But my impression is, that the former was all, that was intended by the language.

In *Smith* v. *Turner* (3 P. Will. R. 413), the cause was heard, and there appearing to the Court some reason to suspect, that the defendant had a deed in his custody, it was ordered, that he should be examined on interrogatories touching the deed. Upon the examination, he denied his having the deed, and all the circumstances relating thereto. The Master certified, notwithstanding, that he thought it reasonable, that the plaintiff, who prayed a commission to examine witnesses to falsify the defendant's examination, should have one. But the Court refused it, saying, "At this rate three or four causes might spring out of one; and though there could be no mischief in examining the party himself; yet the examining witnesses, after publication passed, especially where it may relate to the matter in issue, is against the rule of the Court, and may be greatly inconvenient, and make causes endless." This case certainly affords a strong illustration of the real purport of the general rule; and would

make one hesitate in supposing, that Lord Eldon meant, in the cases above stated, to maintain a broader doctrine.

In *Ward* v. *Eyles* (Moseley R. 377), the Court would not allow a party in a cross bill to examine witnesses after publication passed, and the depositions seen, to the matters in issue in the original cause. On that occasion, the Lord Chancellor said; "There is no rule in this Court more sacred, than, that witnesses shall not be examined in another cause, to matters in issue in a former." Yet, certainly, in a cross bill, the party would be entitled to more favor, than upon a mere application in the original cause.

In the *Mayor of London* v. *Dorcet* (1 Ch. Cas. 228), where a trial of an issue was directed at law, an application was made for a commission to examine a witness eighty years old, who was not discovered until that time, and was unable to travel. If she was able to travel, she would be examinable at the trial, though publication had passed. The Court granted the commission, apparently, as it should seem, upon the ground, that otherwise the testimony would be lost; and yet the witness might, if living, be examinable at the trial at law.

In *Banks* v. *Farquharson* (Ambl. R. 145, S. C. 1 Dick. R. 67), where a hearing was adjourned over, and it was moved for liberty to examine a witness, to prove the handwriting of a witness to a deed, material in the cause, the motion was granted by Lord Hardwicke. So, in *Abrams* v. *Winship* (1 Russ. R. 526), where the evidence proved the execution of the will; but the witnesses had not been examined as to the sanity of the testator; the cause was adjourned at the hearing, and liberty given to exhibit an interrogatory to prove his sanity. In each of these cases, the object was special, to establish the verity of a necessary document in the cause.

In *Blake* v. *Foster* (2 Ball & Beatt. R. 457), an application was made upon the hearing for liberty to adduce newly discovered evidence partly oral, and partly documentary. It was

rejected, not upon any ground of the nature of the evidence; but because it was not in reality newly discovered. The case, therefore, decides nothing to our present purpose.

In *Clarke* v. *Jennings* (1 Anst. R. 173, 174), a motion was made after publication for leave to exhibit interrogatories, to authenticate an old paper writing material in the cause, and for a commission to prove the same. The motion was opposed as being too late, and that exhibits only can be proved after publication. The Court of Exchequer thought, that though not an exhibit, it was in the nature of one, and granted the rule, so as that it did not delay the hearing of the cause. It is proper to remark, that the application was confined to a mere written document.

In *Williamson* v. *Hutton* (9 Price R. 194), after a tithe cause had been set down for a rehearing, a motion was made on behalf of the plaintiff for the examination of one or more witnesses, to prove certain accounts or rentals, and a terrier or memorandum, made by a former vicar, and to read the depositions at the rehearing, upon the ground of their having been discovered since the original hearing, and were before unknown to the plaintiff. The Court granted the motion; and it was added, "If these papers had been found at the hearing, we should have ordered the cause to stand over, for the purpose of giving the plaintiff an opportunity of exhibiting an interrogatory." This too was the case of a written document.

In *Cox* v. *Allingham* (Jacob R. 337), permission was given at the hearing to exhibit an interrogatory as to the loss of a deed, omitted by mistake to be proved in the proper manner. Sir Thomas Plumer, in delivering his opinion on this occasion, stated his strong impression of the dangers, that would arise, if in every instance a party, whose case broke down at the hearing, were at liberty to go into farther evidence. At the same time he admitted, that it was too late to argue, that there could be no case of exception to the general rule, after it had been departed from in

some instances, and by great authorities. He also took notice of the circumstance, that the evidence proposed to be given, related only to the proof of a document.

In *Ord* v. *Nell*, (6 Madd. R. 127), an application was made to file a supplemental bill, in the nature of a bill of review, on account of the discovery of some deeds and facts, connected therewith, since the decree. The Vice Chancellor refused the petition; and the only remarks, material to our present purpose, which he made on that occasion, are;—that if the plaintiff had applied, after he had discovered the contents of these deeds, and before the cause was finally heard, to have the benefit of this discovery at the hearing, the Court would have found the means to render him that justice; and, that the new matter for a bill of the nature proposed must be such, as if unanswered, would clearly entitle the plaintiff to a decree, or would raise a case of so much nicety and difficulty, as to be a fit subject of judgment in a cause. *Brigham* v. *Dawson* (Jacob R. 243), was a similar application, and shared a similar fate.

Coley v. *Coley* (2 Younge and Jerv. R. 44), was an application after publication passed, and the cause set down for a hearing, for liberty to examine two further witnesses, one only having been examined, to prove the execution of a will in the pleadings mentioned. The Court granted it, saying, that if upon the hearing of the cause, the plaintiff had been unable to prove the execution of the will, the case would have been allowed to stand over, for the purpose of supplying that proof, upon payment of the costs of the day.

Then came *Wyld* v. *Ward* (2 Younge & Jer. R. 381), where upon a rehearing, a motion was made to exhibit an interrogatory to prove certain facts, upon the ground, that they were newly discovered since the original hearing. Upon this occasion, there was an elaborate argument by counsel. But the Court granted the motion, saying, that it had a discretion to grant or refuse it, according to the circumstances of the particular case.

In *Williams* v. *Goodchild* (2 Russ. R. 91), an application was made, upon an appeal from a decree of the Vice Chancellor to the Lord Chancellor, for permission to use on the hearing of the appeal, some old documents and bailiff's accounts, which had been discovered since the original hearing. On that occasion, Lord *Eldon* said; "I cannot lay it down, that new evidence can in no case be received; nor will I decide, that it is not to be introduced in this case, if the evidence, here tendered, shall be shown to be in its nature admissible, and a proper ground for its introduction shall be laid." The question was afterwards adjusted by an arrangement between the parties.

These are all the English authorities, bearing directly on the point now before the Court, which the researches of counsel, as well as my own, have brought to my notice. What is very remarkable is, that not one of them presents the case of an application to introduce newly discovered oral evidence; or newly discovered witnesses; but they all relate to written documentary evidence. The Courts, upon deciding upon these applications, however, made no allusion to any distinction, or practice excluding oral evidence; and the generality of the language sometimes used might incline one to believe, that the evidence of new witnesses might, under some circumstances, be within the contemplation of the Court.

Finding no direct English authority, either way, upon the point of the exclusion of oral evidence, unconnected with new written evidence, I have sought for information in cases of an analogous nature, such as bills of review, and supplementary bills, in the nature of bills of review; for (I repeat it), if in such cases, the evidence would be admissible, it ought now to be admitted. Unfortunately, there are not many cases of this sort to be found, and those, which do exist, do not afford any very satisfactory lights to settle the question now before the Court. Indeed, bills of review are of very rare occurrence; Lord Chancellor Lyndhurst, in *Partridge* v. *Usborne* (5 Russ. R. 249,

250), observed, that for the period of a century past very few instances had occurred of bills of review having been allowed to be filed. In that very case, he allowed matters, dependent upon oral as well as written evidence, which had been discovered since the decree, to be brought forward by a supplemental bill, in the nature of a bill of review. But then they related to facts, not previously in issue in the cause. He thus settled a doubt, which had long existed on this very subject; and in respect to which, there was a dictum of Lord *Eldon* the other way, in *Young* v. *Keighley* (16 Ves. 334).

Lord Chief Baron *Gilbert* (Gilb. For. Rom. 186), in laying down the rules, as to granting bills of review, puts one of the requisites in these words: "Thirdly; they can examine to nothing, that was in issue in the original cause, unless it be any matter happening subsequent, which was not before in issue, or upon matter of record, or *writing, not known before.* For, if the Court should give them leave to enter into proofs upon the same points, that were in issue, that would be under the same mischief, as the examination of witnesses after publication, and an inlet into manifest perjury." Now, if this is to be deemed a true exposition of the doctrine in Courts of Equity, it makes an end of the present application. The difficulty is, whether the modern decisions affirm the practice in so limited a form.

Lord *Hardwicke*, in *Norris* v. *Le Neve* (3 Atk. R. 35), said, that the rules of Lord *Bacon* upon bills of review had never been departed from. And, professing to give the substance of those rules, he added, "By the established practice of this Court there are two sorts of bills of review; one founded on supposed error appearing in the decree itself; the other a new matter, which must arise after the decree; or upon new proof, which could not have been used at the time, when the decree passed." The ordinance of Lord *Bacon* is substantially as here stated; his language on the last matter is: "Nevertheless, upon new proof, that is come to light after the decree made, and could

not possibly have been used at the time, when the decree passed, a bill of review may be grounded."[1] In the case of *Norris* v. *Le Neve*, the application for the bill of review was not confined to "new proof" of a mere documentary character; but it embraced other facts of an oral nature; and Lord *Hardwicke* took no notice of any distinction between oral and written evidence. But he did take notice, that the new discoveries amounted to no more than corroboratives only of the former points in issue. In another case, *Gould* v. *Tancred* (3 Atk. R. 354), before the same great Judge, no notice was taken of any positive distinction between oral and written evidence, although certainly there may be good ground for such a distinction. In *Young* v. *Keighly* (16 Ves. R. 354), which indeed was an application founded on the discovery of new documentary evidence, Lord *Eldon* said; "As far as I can ascertain, what the Court permits with regard to bills of review upon facts newly discovered (he does not say, documents), the decisions appear to have been upon new evidence, which, if produced in time, would have supported the original case." He added also in the same case; "The ground is even apparent on the face of the decree; a new evidence of a fact (not saying written evidence) materially pressing upon the decree, and discovered at least after publication in the cause." In *Patridge* v. *Usborne* (5 Russ. R. 145), the new evidence (which went to points not before in issue) was certainly largely founded in mere oral proofs and testimony; yet it was admitted. The language of Lord Eldon in *Milner* v. *Lord Harwood* (17 Ves. R. 148), already cited, appears to me to confirm the conclusion, that upon rehearings and bills of review, upon newly discovered evidence, parol evidence to facts is not necessarily prohibited by any general practice or rule of law.

[1] Beames's Ord. in Ch. p. 2, and note (3). See also *Patterson* v. *Slaughter*, Ambl. R. 293.

I had occasion, in the case of *Dexter* v. *Arnold* (5 Mason R. 303, 313, 314), to examine this subject with a good deal of care in reference to bills of review. I was not, at that time, able to satisfy my mind, that the doctrine, as to the admissibility of newly discovered evidence, was limited to written evidence of a documentary nature. The subsequent authorities have not helped the matter in this particular. Upon principle it may, perhaps, be found difficult in all cases practically so to limit it; although no person is more sensible than myself of the great inconvenience and danger of admitting new evidence of a parol nature, after the former evidence in the cause has been seen; and, *a fortiori*, after the original cause has been heard. The reasons are well stated in *Jones* v. *Purefoy* (1 Vern. R. 47); and still more forcibly in the case of *Respass* v. *McClanahan* (Hardin R. 346, 347); to which I shall presently advert. In examining the decisions of Mr. Chancellor *Kent*, in which he has collected the leading English decisions on this point, not only after publication, but upon bills of review, it will be seen, that he has exhibited a strong disinclination to allow the introduction of any newly discovered evidence, merely cumulative, or not of a documentary nature. This is manifested in an especial manner in *Hamersley* v. *Lambert* (2 Johns. Ch. R. 432), in *Livingston* v. *Hubbs* (3 Johns. Ch. R. 124), and *Troop* v. *Sherwood* (3 Johns. Ch. R. 558). Yet he is compelled to admit, that there may be exceptions to the general rule. I cannot find, however, that he has ever made a direct decision, that the newly discovered evidence of witnesses to the facts in issue is not admissible on a hearing, or rehearing, or bill of review. He has, indeed, on one occasion said, that the nature of the newly discovered evidence must be different from that of the mere accumulation of witnesses to a litigated fact.[1] But his decision did not turn particularly upon that point. The language in *Taylor* v. *Sharp*

[1] *Livingston* v. *Hubbs*, 3 Johns. Ch. R. 127.

(3 P. Will. 371), upon which he has placed some reliance for this qualification of the doctrine, does not seem to me to have looked to any supposed difference in regard to the nature of the new matter, that is, whether newly discovered testimony, or newly discovered documents; but singly to the fact, that it was newly discovered matter of some sort.

I have thus gone over the principal cases (with an exception, which will presently appear), which seem to me to be applicable to the more general question before the Court. The result has been already incidentally suggested. But I will give it in a more direct and positive form. It is, that there is no universal and absolute rule, which prohibits the Court from allowing the introduction of newly discovered evidence of witnesses to facts in issue in the cause, after publication and knowledge of the former testimony, and even after the hearing. But the allowance of it is not a matter of right in the party, but of sound discretion in the Court, to be exercised cautiously and sparingly, and only under circumstances, which demonstrate it to be indispensable to the merits and justice of the cause.

I am driven, therefore, and I regret it, by this view of the matter, to the consideration of the special circumstances of the present case, and to decide, whether the Court ought, upon general principles, and in the exercise of its just discretion, to grant the present petition. The objections, which forcibly present themselves against it, are; (1.) The great length of time since the publication of the evidence; (2.) The nature of the evidence itself, being the asserted confessions of the defendant, to many of the most material points in the case, a species of evidence, of which it has been truly remarked, that it is the most easy to fabricate, and the most difficult to refute; and (3.) The fact, that it is merely cumulative or corroborative testimony to the very points in issue. In my judgment, each of these objections has great intrinsic weight. The last has been thought by Mr. Chancellor *Kent* as of itself decisive. I find, too, that the

same view of the matter has been taken by several other of the American Courts, upon very solemn occasions. In *Respass* v. *McClanahan* (Hardin R. 342), it was held by the Court of Appeals of Kentucky, at that time adorned by minds of uncommon ability, that the discovery of new witnesses to prove a matter of fact in issue in the original cause, is not a ground for a bill of review. The reasoning of the Court is so very full and clear on the point, that I would gladly transfer it to this opinion, if it would not occupy too large a space. Upon that occasion the Court said, that after the most careful search, they could not find one case reported, in which a bill of review had been allowed on the discovery of new witnesses, to prove a fact, which had before been in issue; although there were many, where bills of review have been sustained on the discovery of records and other writings, relating to the title *generally* put in issue. The same doctrine has been since repeatedly affirmed by the same Court; and particularly in *Bowles* v. *South* (Hardin R. 451), and *Head* v. *Head* (3 Marsh. R. 121). It was also adopted and acted on by the Court of Appeals of Virginia, in *Randolph's Ex'rs.* v. *Randolph's Ex'rs.* (1 Hen. & Munf. R. 180).

I am not able to satisfy myself, that this objection to the evidence is not well founded. On the contrary, the more I reflect, the more I feel the difficulty of the admissibility of merely cumulative and corroborative testimony, though newly discovered, to the facts in issue. If I were to decide in favor of its admissibility, I should, as far as I know, be the first Judge, who ever acted upon so broad a doctrine. I am not bold enough to adventure upon such a course. On the contrary, if I were called upon to frame a rule, it would be to exclude all testimony of newly discovered witnesses to any facts in issue, unless connected with some newly-discovered documents. There is no authority in favor of the petition. There is authority against it. No book of practice states any thing, which leads to the

conclusion, that evidence, like that now proposed, has ever been admitted at the original hearing, or upon a rehearing, or upon any bill in the nature of a bill of review. So far as the books of practice speak, they lead in the opposite direction.[1] My judgment, therefore, is, under all the circumstances, that the motion ought not to be granted.

UNITED STATES *v.* HENRY BURDETT AND OTHERS.

Where whales are caught, and oil is manufactured, by the crew of an American vessel, the oil is not the product of "foreign fishing," within the purview of the Revenue Laws of the United States, though it has since been owned, and brought into port, by persons in a foreign service.

WRIT of Error from the District Court of Massachusetts District. The original suit was debt on a duty bond. At the trial a bill of exceptions was offered, and signed, in substance as follows:—The defendants proved, that the ship *Helvetius*, a ship of the United States, and owned by certain citizens of the United States, sailed from New London on a whaling voyage, on the 4th of July, 1832. That she went into the Pacific Ocean, and on her voyage took 1500 barrels of spermaceti oil. The Helvetius, with all this oil on board, was stranded on the coast of Oahee, one of the Sandwich Islands, on the 9th of November, 1834. About one third of the oil was lost when the vessel was wrecked, and the voyage was broken up. Of the oil that was saved, one third went to the salvors. The king of the island, John C. Jones (the consul of the United States), and French & Co. were the salvors. The said Jones, and French &

[1] See Hinde's Pract. 59 to 63. Gilb. For. Rom. 186. Wyatt Pract. Reg. 94 to 97. Id. p. 353 to p. 355.

Co. were citizens of the United States, then residing on the said island, and transacting business there. The share of the oil belonging to the king, in manner aforesaid, was sold to William S. Hinckley, who is a native citizen of the United States. The crew of the Helvetius were paid off in oil, and their share, being about 4000 gallons, was bought by said Hinckley. All the oil thus purchased by Hinckley, was shipped by him on board the barque Don Quixotte, a vessel of the United States, and consigned to Henry Burdett, one of the defendants, who is a citizen of the United States. The bond in suit was given for the duties claimed to be due on the oil consigned to said Burdett as aforesaid.

On this evidence, the Attorney for the United States requested the honorable Judge to instruct the jury, that the oil aforesaid, within the meaning of the statute of the United States, was oil of foreign fishing, and subject to duty, and that the plaintiffs were entitled to a verdict to the amount then due on the bond aforesaid. But the Judge refused so to instruct the jury. On the contrary thereof, the jury were instructed, that the oil in question, being the production of United States fishery, could not be considered, under the circumstances proved, to be of foreign fishery, within the intent and meaning of the laws of revenue, or as such liable to the duties for which that said bond was taken.

Judgment was rendered in favor of the defendants, upon the verdict; and the present writ of error was brought to revise that judgment.

Mills, District Attorney, for the United States; *C. P. Curtis* and *E. G. Loring* for the defendants.

Story J. My judgment is, that the opinion of the District Judge was perfectly correct, as it was laid down to the jury at the trial. The question is, whether this oil was the product of "foreign fishing," within the true intent and meaning of the re-

venue laws of the United States. Whether foreign or not, depends upon the character of the vessel, and the voyage at the time when the whales were caught, and the oil manufactured; and not upon any subsequent events. Now, it is not disputed, that the Helvetius was an American vessel, duly licensed and employed in the whale fisheries under the authority of our laws; and that the oil was manufactured from whales caught by her crew during her whaling voyage. If so, it was clearly in the sense of our laws, not the product of "foreign fishing," for that means fishing in or by foreign vessels under foreign flags; but strictly domestic fishing, or American fishing. If this oil had been brought into our ports by the Helvetius, there could be no doubt, that it would not be liable to duties, as the product of "foreign fishing." It can make no difference in its original character, that it has come into port in another vessel. The question is not, by whom it is owned, or by whom imported; but whether manufactured by persons in a foreign service, or by persons in the American service. It takes its character from its origin. *Noscitur ab origine.*

The judgment must, therefore, be affirmed.

JAMES SMITH *v.* STOVER RINES AND OTHERS.

The language of the Judiciary Act of 1789, ch. 20, § 12, though in its terms it applies only to the case of a single defendant, must be applied to the party defendant, whether one or many, so as to embrace cases, where several aliens, or several citizens of another State, are jointly sued as defendants.

According to the section above-cited, such cases only are liable to removal from the State to the Circuit Court, as might, under the law or constitution of the United States, have been brought before the Circuit Court by original process.

Semble. An action on the case, in the nature of an action for a conspiracy,

may be maintained, as in the case of a common tort, against all, or any one, or more of the tort-feasors.

In cases of tort, the plaintiff may elect to make his action joint, or several; and no defendant can take away this election.

In order to remove a cause from the State to the Circuit Court, under the Judiciary Act of 1789, ch. 20, § 12, all the defendants must join in the petition for the removal. And a cause cannot be removed as to some defendants, and left depending in the State Court as to others.

A severance of a suit, so as to make two several suits out of one joint suit, is not allowed at the common law as to parties defendant.

Quære—as to the remedy, where the provisions of the act above-cited are evaded, by a fraudulent joinder of nominal defendants, in order to prevent a removal of the suit.

THIS was an action of trespass on the case, in the nature of a conspiracy to defraud, and for actually defrauding the plaintiff, James Smith, in the purchase of certain lands, situate in Maine. The damages were laid at $65,000. The action was originally brought in the Court of Common Pleas of the county of Worcester, in the State of Massachusetts; returnable to the last March term of that court, by James Smith, a citizen of Massachusetts, against four persons, specially named in the writ, as inhabitants of the county of Worcester (upon whom the process was duly served); against Stover Rines, described in the suit, as of Orono, in the State of Maine, and commorant in Boston, in the county of Suffolk (upon whom also the process was served), and against three other persons, described as inhabitants of the State of Maine, upon whom the process was not served. All the parties, upon whom the process was served, regularly appeared at the return term. And the defendant, Rines, then filed his separate petition, praying for a removal of the cause into the Circuit Court, at the present May term, according to the provisions of the 12th section of the Judiciary Act of 1789, ch. 20. The plaintiff entered a protest against the removal; which was ordered and allowed by the Court, with a stay of all further proceedings in that court.

A motion was now made by the plaintiff, to remand the cause

to the State Court, upon the ground, that it did not fall within the provisions of the 12th section of the Act of 1789, and, therefore, that it was incompetent for the Court to maintain jurisdiction over it.

Emory Washburn and *Jeremiah Mason* for the plaintiff; *Peleg Sprague* for the defendants.

Washburn, for the plaintiff. This Court has no jurisdiction over the present parties, under the Judiciary Act of 1789, ch. 20. If any thing gives it jurisdiction, it is the parties; for the subject-matter of the suit does not give it. The process is not a new one; it is the same *cause*, which was commenced in the State Court, and is brought here, with all its incidents. The words of the statute are, "the cause shall proceed in the same manner as if it had been brought [in the Circuit Court] by original process." 1st. One of several defendants cannot, against the consent and without the co-operation of the other defendants, remove a cause into the Circuit Court. Under the terms, "citizen" and "defendant," which are used in the singular number in the statute, all the parties defendant must be considered as one party. *Ward* v. *Aredondo*, 1 Paine R. 415. If this be so, one defendant cannot remove a cause into the Circuit Court, when the others elect to have it remain in the State Court. 2d. But this cause is not within the jurisdiction of this Court, even if all the defendants elect to be tried here, because the plaintiff, and part of the defendants are citizens of Massachusetts. The Constitution of the United States extends the jurisdiction of the courts under it to "controversies between citizens of different States." The statute of 1789, ch. 20, § 11, limits this power to cases "where the suit is between a citizen of the State where the suit is brought, and a citizen of another State." And in determining the question of jurisdiction, when it depends upon the character of the parties, the Court are governed by the *record* alone. The cases are numerous, where this point has been discussed in various forms. *Brigham* v.

Cabot et al. 3 Dall. R. 382; *Wood* v. *Wagnon*, 2 Cranch R. 9; *Winchester* v. *Jackson*, 3 Cranch R. 515; *Montalet* v. *Murray*, 4 Cranch R. 46; *Hodgsdon* v. *Bowerbank*, 5 Cranch R. 303; *Sullivan* v. *Fulton Co.*, 6 Wheat. R. 450; *Breithaupt* v. *Bank of Georgia*, 1 Peters S. C. R. 238; *Brown* v. *Keene*, 8 Peters R. 116; *White* v. *Fenner*, 1 Mason R. 520. By inspecting the record here, it will be found that four of the defendants are not citizens of another State than that in which the action was brought. It is the plaintiff's common-law right to join these defendants in this action. 1 Chitty Pleading, 74; *Skinner* v. *Gunton*, 1 Saund. R. 228. The cause, then, is one in which all the defendants are *jointly* interested, for it is now the same cause that it was in the State Court. And where the defendants in a cause are jointly interested, and not merely nominal, if either is a citizen of the same State as the plaintiff, the Court has no jurisdiction. The authorities seem to be conclusive on this point. *Strawbridge* v. *Curtis*, 3 Cranch R. 267; *Corporation of New Orleans* v. *Winter et al.*, 1 Wheat. R. 91; *Cameron et al* v. *McRoberts*, 3 Wheat. R. 591; *Wormly* v. *Wormly et al.*, 8 Wheat. R. 451; *Banks* v. *Carneal*, 10 Wheat. R. 182; *Kirkpatrick* v. *White et al.*, 4 Wash. R. 598; *Beardsley* v. *Torrey*, 4 Wash. R. 286; *West* v. *Randall*, 2 Mason R. 196; *Ward* v. *Arredondo et al.*, 1 Paine R. 410. The same doctrine has been recognised by State Courts; *Miller* v. *Lynde*, 2 Root R. 444; *Bissell* v. *Horton*, 3 Day R. 281.

It may be contended, that, as in the trial of the action, all but Rines may be discharged, and a verdict against him alone would be good, he may be tried separately. But this cannot be done against the plaintiff's consent. If it was his right to join Rines, the latter cannot be severed without doing the plaintiff a wrong. It would make the other defendants witnesses for Rines. Roscoe's Evid. 84; *Gibbs* v. *Bryant*, 1 Pick. R. 128. It would also prevent the plaintiff from having a joint judgment, and compel him to accept from Rines the amount found, when, by com-

mon law, he has a right to a judgment against all the defendants found guilty, *de melioribus damnis*. If this Court undertakes to proceed against Rines alone, it can only do so by dividing the original action into two, leaving half in the State Court, and half in this. But this would be expressly against the language of the statute, which declares, that the State Court, after the removal, "*shall proceed no farther in the cause.*" The whole record must come up; and when does the division take place, and which Court makes it? Is the division made in the State Court, or is a part of the cause remanded?

Sprague, for the defendants. The plaintiff being a citizen of Massachusetts, the defendant, Rines, a citizen of Maine, claims the right to a trial in this Court, by virtue of the Constitution of the United States, art. 3, sec. 2, and the Judiciary Act of 1789, sec. 11 and 12, which were intended to secure the citizens of each State against being compelled to have their controversies with citizens of another State decided by the local tribunals of the State of their adversary. This right the defendant may waive, either by submitting to the State jurisdiction, or voluntarily incurring liabilities by joint contracts with citizens of another State. But such waiver must result from his own voluntary act, and not from the will or act of his adversary. If this action were founded on contract, it could not be maintained against Rines alone, it would be necessary to prove a joint contract by the defendants with the plaintiff, and in such case Rines, by thus voluntarily associating himself with the defendants, citizens of Massachusetts, in making engagements to the plaintiff, might be held to have subjected himself to the same jurisdiction as his associates, as the remedy in actions *ex contractu* must be joint, and the plaintiff could not sue the other defendants in the courts of the United States. But this is an action of tort brought against Rines, and other persons with whom he has never had any connexion or association, and with whom he is now coupled, without any agency of his own, and

against his will, by the mere adversary act of the plaintiff. If there could be no judgment against him unless the other defendants were also found guilty, he would have the benefit of their co-operation in the defence, and that security for the impartiality of the Court, which arises from the necessity of their giving judgment against their own citizens at the same time and for the same cause as against a stranger. But in this case, a verdict and judgment might be rendered against Rines alone, and he would have no right to contribution. The interest of the other defendants may be adverse to him, for if they have done wrong, it may suit their purposes to throw the whole burthen upon a stranger. This is not mere theory. Should this case proceed to trial, it will be seen, that such adverse interest is matter of fact. Ought then Rines, a citizen of Maine, to be deprived of the benefit of having a trial in the courts of the United States, and compelled to submit to a final decision in the State Court of an adversary, merely because that adversary has seen fit to bring in other persons, all of whom are hostile in interest to Rines. Could such have been the intention of the Judiciary Act? If this were a new question, would any one doubt that this defendant comes within both the letter and the spirit of the 12th section of that act? But we contend, that no case has decided the present question, and that it is competent for this Court to allow this defendant to transfer his case into the Circuit Court, even if the effect should be to leave the action to proceed in the State courts as against the other defendants. No adjudication has gone further than to prohibit a severance in case of joint contracts, and there are several cases, especially in equity, in which the right to sever is recognised for the purpose of sustaining jurisdiction, where it would not otherwise be allowed. In answer to the objection, that the plaintiff, by the common law, has a right to proceed against the defendants, either jointly or severally, at his election, and that he has elected to proceed jointly, we answer, that, without pausing to discuss what the

right may be at common law, it is undoubtedly competent for the legislature to change it. The common law, therefore, cannot be interposed, to resist the legitimate operation of the Judiciary Act. The counsel commented on authorities cited on the other side, and referred to the following: *Skinner* v. *Gunton et al.*, 1 Saund. R. 228 c. and 229, 239, note 4; *Govett* v. *Radnidge*, 3 East R. 67; 1 Chitty Plead. 75; *Strawbridge* v. *Curtis*, 3 Cranch R. 267; *Carneal* v. *Bankes*, 10 Wheat. R. 181; *Cameron* v. *Roberts*, 3 Wheat. R. 571; *Gordon* v. *Coldcheagh et al.*, 3 Cranch R. 269; *Brown et al.* v. *Strode*, 5 Cranch R. 303; *Wormley* v. *Wormley*, 8 Wheat. R. 421; *Craig* v. *Cummings*, 2 Wash. C. C. R. 505; *Browne* v. *Browne*, 1 Wash. C. C. R. 429.

Mason, in reply, was stopped by the Court.

Story J. The motion has been very ably and elaborately discussed at the bar; and I should have heard the further argument, which was proposed to be made in support of it, if, upon hearing all, that has been so ingeniously said on the other side, I could bring my mind to doubt, that the motion ought to be granted.

The 12th section of the Judiciary Act of 1789, ch. 20, provides, "that if a suit be commenced in any State Court against an alien, or by a citizen of a State, in which the suit is brought, against a citizen of another State, and the matter in dispute exceeds the sum or value of five hundred dollars, exclusive of costs, to be made to appear to the satisfaction of the Court, and the defendant shall, at the time of entering his appearance in such State Court, file a petition for the removal of the cause for trial into the next Circuit Court to be held in the district, where the suit is pending, and offer good and sufficient surety for his entering in such Court, on the first day of its session, copies of said process against him, and also for his there appearing and entering special bail in the cause, if special bail was originally

requisite therein, it shall be the duty of the State Court to accept the surety, and proceed no further in the cause, &c.; and the said copies being entered in such Court of the United States, the cause shall there proceed in the same manner, as if it had been brought there by original process."

Now, the first remark, that occurs upon the language of this section, is, that in its terms it applies only to the case of a single defendant. But, in its true interpretation, it cannot admit of a rational doubt, that it means the party defendant, whether one or many, and that it must apply to cases, where several aliens, or several citizens of another State, are jointly sued as defendants; for in such a case, each of them is in the very predicament presumed by the act.

In the next place, it is apparent, from the language of the closing passage of the section above quoted, that it contemplates such cases, and such cases only, to be liable to removal, as might, under the law, or at all events under the Constitution, have been brought before the Circuit Court by original process. And this consideration, upon the actual state of the authorities, is most important. The case of *Strawbridge* v. *Curtis et al.* (3 Cranch R. 267), the earliest on the subject, was a bill in equity, originally brought in the Circuit Court of this district; and some of the plaintiffs were alleged to be citizens of Massachusetts. The defendants were all stated to be citizens of Massachusetts, excepting Curtis, who was alleged to be a citizen of Vermont, and upon whom the process was served in Massachusetts. The question made at the bar under these circumstances was, whether the Circuit Court had jurisdiction of the cause, under the Judiciary Act of 1789, ch. 20, sec. 11, which provides, that "the Circuit Courts shall have original cognizance, concurrent with the courts of the States, of all suits of a civil nature, at common law and in equity, where the matter in dispute exceeds the sum or value of five hundred dollars, and the United States are plaintiffs or petitioners; or an alien is a party;

or *the suit is between a citizen of the State, where the suit is brought, and a citizen of another State.*" The Supreme Court decided against the jurisdiction. Upon that occasion, the late Chief Justice said, "The Court understands these expressions to mean,—that each distinct interest should be represented by persons, all of whom are entitled to sue, or may be sued in the federal courts. That is, where the interest is joint, each of the persons concerned in that interest must be competent to sue, or liable to be sued in those courts. But the Court does not mean to give an opinion in the case, where several parties represent several distinct interests, and some of these parties are, and others are not, competent to sue, or liable to be sued in the courts of the United States." This language, it is true, was applied to a case, where the suit was originally brought in the Circuit Court. But it has always been understood as equally applicable to all cases of suits removed from a State court. And, looking to the words used in the 11th and 12th sections of the act, as to this point, it seems absolutely impracticable to make any solid distinction between them. My brother, the late Mr. Justice *Washington*, so thought in the case of *Beardsley* v. *Torrey* (4 Wash. Cir. R. 286). "If," said he, "this suit could not have been maintained against S. under the 11th section of the Judiciary Act, if it had originated in this Court, it cannot be removed into this Court under the 12th section, so as to subject that party to the jurisdiction of this Court." This reasoning is certainly correct, in the sense in which he used it, that is, as requiring all the parties on each side to be citizens of different States, though certainly there is a distinction in other respects; for, under the 11th section, the plaintiff need not be a citizen of the State, where the suit is brought, as he must be under the 12th section.

The case of *Strawbridge* v. *Curtis* has never been departed from; but has constantly been recognised as the basis of the subsequent decisions of the Supreme Court upon this branch of jurisdiction. It was expressly confirmed in *The Corporation of*

New Orleans v. *Winter* (1 Wheat. R. 91), and *Cameron* v. *Roberts* (3 Wheat. R. 596). And Mr. Justice *Thompson*, in his able opinion in *Ward* v. *Arredondo* (1 Paine Cir. R. 410), applied it (as Mr. Justice *Washington* did in *Beardsley* v. *Torrey*), to the exposition of the jurisdiction of the Court in cases of removal of suits, equally with those of original suits. "It is," said he, "a well-settled rule, and indeed has not been denied by the defendants' counsel, that when the jurisdiction of this Court depends on the character of the parties, and such party, either plaintiff or defendant, consists of a number of individuals, each must be competent to sue in the courts of the United States, or jurisdiction cannot be entertained." He then applied the doctrine to the very case before him, which was that of a plaintiff, a citizen of New York, suing a bill in equity, in a State Court, against certain aliens, and also against Thomas, a citizen of New York, the alien seeking to remove it into the Circuit Court. After putting the point, whether, as the plaintiff, and Thomas, one of the defendants, were both citizens of New York, the cause could be removed into the Circuit Court, he said; "It is very evident, that Ward (the plaintiff) could not originally have filed his bill in this Court against Thomas, as one of the defendants; and it would seem to follow as a necessary consequence, that if jurisdiction could not be entertained directly, it ought not to be acquired indirectly."

But the argument, which has been addressed to the Court upon the present occasion is, that in the suit now before us the defendant has a separate and distinct interest from his co-defendants, and, therefore, it falls within the reasoning of the Court in the case of *Strawbridge* v. *Curtis*, as a suit, not only within the original jurisdiction of the Circuit Court, but within the jurisdiction founded on the removal from the State Court. It is certainly true, that actions, founded in tort, may be maintained against all, or any one or more of the tort-feasors; for every tort is joint, as well as several; and the case of *Skinner* v.

Gunton (1 Saund. R. 228), is relied on to show, that an action on the case, in the nature of an action for a conspiracy, falls within the limits of the doctrine. That case, it must be admitted, is directly in point, though at first view, the objection taken by Sergeant *Saunders* seems to be well founded; viz. that where a conspiracy is alleged by several, and all the defendants are acquitted, but one, the action must fail; for one cannot conspire alone. This is true in a criminal accusation. But the true answer to the objection *civiliter* is that given by the Court, that the conspiracy is but inducement, and not the substance of the action, which was there the undue arresting of the plaintiff; and here it is the fraud actually perpetrated upon the plaintiff, to his grievous injury.

But, assuming it to be true, that the tort, stated in this action, is several, as well as joint, still it does not advance the argument at all, unless it can be established, that the defendant has a right to elect to consider it as several, and also that the defendant has no joint interest in this suit. Now, at the common law, which is the law of Massachusetts, and which this Court, equally with the State Court, is bound to administer, nothing is more clear, than the right of the plaintiff to bring an action of this sort against all the wrong-doers, or against any one or more of them, at his election. There is no principle, upon which the defendant has a right, in any courts of justice, to say, that the action shall be several, and not joint; and thus to take away the right of election, which the plaintiff has by law, to make it joint. If the defendant has no such right, upon what pretence can this Court, in virtue of the removal of the suit from the State Court, confer upon him any such privilege. We must administer the *lex loci* here, and not the law which the defendant may assume to make for his case.

And then, again, if the tort is several, it is also joint; and when the plaintiff has joined all the wrong-doers, it is clear, that they have a joint interest in the event of such suit. They are

jointly liable for the damages, which may be assessed against them by the jury; and if they sever in their pleadings, or the jury assess different damages against them severally, the plaintiff has a right to a joint judgment *de melioribus damnis*.[1] So, that it is difficult to maintain the position, that in this case the defendant has a separate and distinct interest from the other defendants throughout. On the contrary, for the general purposes of the suit, he has a joint and common interest with them.

The distinct and separate interest referred to in *Strawbridge* v. *Curtis*, is one, which constitutes the sole interest in the cause, all the other parties being merely nominal; or a distinct and separate interest, in no sense and under no circumstances connected with that of other persons. If a party has a distinct and separate interest, and also a joint interest, as where he is sued upon his joint and several bond, it has never been supposed, that the general rule laid down in that case did not apply. Thus, for example, in the case of *Cameron* v. *McRoberts* (3 Wheat. R. 591), where the suit was a bill in equity against Cameron and two others, whose citizenship was not stated, the Court said, "If a joint interest vested in Cameron and the other defendants, the Court had no jurisdiction of the cause. If a distinct interest vested in Cameron, so that substantial justice, so far as he was interested, could be done without affecting the other defendants, the jurisdiction might be exercised as to him alone." And it is most material to remark, that this case and all the others, in which a separate and distinct interest, or a nominal interest, is spoken of, were bills in equity, capable in their own nature of separate and distinct decrees upon separate and distinct interests, where there was, or might be, no community of interest, and where the general question was presented as to the proper parties necessary to be made in a suit in equity. Very different considerations do, or at least may apply, to suits at common law,

[1] 2 Tidd's Pract. 804, 805. Heydon's case, 11 Co. R. 7. *Salin* v. *Long*, 1 Wils. R. 30. *Johns* v. *Dodsworth*, Cro Car. 192, 193.

where the nonjoinder or misjoinder of parties has a very different effect upon the character of the suit, and very different rules apply to it. This is abundantly evident from what is stated in *Wormly* v. *Wormly* (8 Wheaton R. 451), *Carneal* v. *Banks* (10 Wheat. R. 181), *Dunn* v. *Clarke* (8 Peters R. 1), and *Boone's Heirs* v. *Chiles* (8 Peters R. 532). In *The Corporation of New Orleans* v. *Winter* (1 Wheat. R. 91), where a citizen of a State and a citizen of a Territroy sued as joint plaintiffs, the jurisdiction was held to be gone. The Court said, "In this case it has been doubted, whether the parties might elect to sue jointly or severally. However this may be, having elected to sue severally, the Court is incapable of distinguishing their case, so far as respects jurisdiction from one, in which they were compelled to unite." So here, upon like grounds, it may be said, that being united compulsively by the plaintiff, the defendants are to be treated throughout as being joint and proper parties in the suit.

But if these difficulties in the case could be overcome, there are others, which, upon the construction of the 12th section of the act, seem absolutely insuperable. In the first place, the act contemplates, that the removal of the cause is to be with the joint assent of all the parties defendant; for it can scarcely be treated as a privilege of one defendant, exclusive of the others. Suppose the present suit were brought against several aliens, or several citizens of another State, and some of the defendants were in favor of a removal of the suit from the State tribunals, and others against it, which of them are to prevail? The act seems intended to give an option to the party defendant, which may be exercised or not, at the pleasure of all standing in the same predicament. But if one may remove without the consent of the others, then, the option may be defeated at the pleasure of one only. My brother, Mr. Justice *Thompson*, has put the case strongly, in delivering the opinion of the Court in the case of *Ward* v. *Arredondo* (1 Paine Cir. R. 415). "Can," (said

he) " then, one of the alien defendants compel his co-defendant to follow him into this court against his will? We put the case thus strongly in order to test the principle. And we cannot discover any satisfactory ground, upon which such a doctrine can be sustained. The judiciary act considers the removal of the cause as the voluntary act of the party on his petition. By the word *party*, as here used, must necessarily be understood, the defendant, embracing all the individuals, be they more or less, constituting such party." This reasoning upon the face and purport of the act appears to me to be unanswerable in the case put. It equally, in my judgment, applies to every other case, where all the defendants have not (as they have not in the present case) petitioned for the removal. The application must be joint, for the benefit of all, and with the consent of all. Indeed, there is a more urgent ground for its application, if the suggestions, already made, are well founded; for the defendants in this case, who are citizens of Massachusetts, are *per se*, incapable of removing the suit. Can they be placed in a better predicament, than if they had united in the petition with one, who was a citizen of another State, and therefore capable?

And this leads me, in the next place, to the consideration, which has been so strongly urged at the bar, as to the right of removal of a cause in part from a State court, leaving it still, as to other parties, depending therein. It appears to me, that the very terms of the act prohibit any such partial removal of a suit. It declares, that when the petition and surety are properly offered and given, " it shall then be the duty of the State Court to accept the surety, and *proceed no farther in the cause*," which language necessarily supposes an entire removal of the cause, and not a removal of it as to some parties only. The Circuit Court, too, is to proceed therein in the same manner, as in original suits commenced in that Court. So that in all cases, where the local law would govern in the decision upon the forms or merits of the proceedings in an original suit, it must in like

manner govern in those forms and proceedings in the removed suit. It is plain, that there can be nothing in the nature of a summons and severance in the suit; for that supposes that some parties have a right to proceed to establish their claim as plaintiffs, there being other parties necessary to be joined in point of form as plaintiffs, who are unwilling to proceed at all. Such a proceeding is never allowed as a severance of a suit at the common law, as to the parties defendant, so as to make two several suits out of one joint suit.

But independent of the language of the act, how would it be possible, upon any acknowledged principles of law, to proceed in this suit in the State Court, as to some parties, and in this Court as to other parties, treating it (as it certainly must be treated) as a joint suit, upon which there may be a joint, as well as a several judgment? Consider, for a moment, the posture of the case, if the suit is removed as to Rines, and is still proceeded in in the State Court, as to all the other defendants, upon whom process has been served. Both Courts must render such a final judgment upon the whole cause of action, as the local law (which in this case is the common law) requires, upon the whole record. The final judgment must be just such a judgment as would be warranted by law, if all the parties were before either Court, and there had been a final trial as to all the defendants, upon joint or separate pleadings. Now, the first difficulty, which occurs is, how, after the removal of a part of the cause from the State Court to the Circuit Court, either Court can, judicially, know what is finally done as to the residue by the other Court. The further proceedings in either court, after such a removal, constitute no part of the record of the proceedings of the other Court; and no process of *certiorari* lies to bring them before the other. Suppose, that all the defendants in the State Court should be convicted on trial, and damages of one thousand dollars be jointly assessed against them by a jury; and suppose, that damages should, in like manner upon trial, be rendered against

Rines in the Circuit Court, more or less than the damages assessed in the State Court, what judgment is to be rendered? The plaintiff, in such a case, would by law be entitled to a joint judgment against all the defendants, *de melioribus damnis*. Where on the record of either Court could be found the materials for such a judgment? Nay more; where could be found the materials to show, that any verdict at all had been rendered in the other court? Suppose, some of the defendants in the State Court should be acquitted, and others convicted, and damages assessed against the latter in the State Court, and damages also assessed against Rines in the Circuit Court to the same amount, or to a greater or less amount, what judgment is to be rendered in either court? It is plain, that the plaintiff would be entitled to a joint judgment against all the defendants, who were connected, and against execution. But in what manner can either Court proceed to enter such a judgment, there being on its own records no proof of the proceedings in the other court? Suppose, Rines, upon a trial here, should be acquitted, and some of the defendants in the State Court should also be acquitted, and others convicted, what is to be done? We all know, that if the final judgment in the cause were wholly in either court, it would be a general judgment, that all the defendants acquitted should go without day; and that the plaintiff should recover his damages against the others. A several judgment as to some of the defendants, without disposing of the others, would, upon the clearest principles of the common law, be bad and unwarrantable. In the case supposed, in what manner is either Court to render such a general judgment as to all the parties?

I have stated these difficulties, because they are the very difficulties, which in the farther progress of the cause here, if we could maintain jurisdiction over it, may, nay, must arise. I know not, how they are are to be overcome. Indeed, the only possible manner, in which a removal by one defendant to this Court could be sustained, either in an action of contract, or of

tort, would be by considering such a removal as ending the suit as to all the other parties, and taking from the plaintiff his right to a joint action. There is certainly no authority for that; and I know no principle to justify it.

My brother *Washington*, in *Beardsley* v. *Torrey* (4 Wash. Cir. R. 286, 288), held, that a suit, if removable at all, must be entirely removed. It cannot be severed, and a part only removed. "Not only," said he, "would such a doctrine be attended with absurdity and inconvenience; but it would be repugnant to the language and to the clear meaning of the 12th section" of the act of Congress. Notwithstanding the criticism bestowed at the bar upon this case, it appears to me directly in point. And that most learned and pains-taking Judge added (what is equally in point in this suit), that there was another reason, why the Circuit Court could not take cognizance of the cause, as a removed cause, which was, "that S. (one of the defendants) did not join in the petition for the removal; and it is not competent for one defendant to remove the cause, without the consent of all the defendants."

But it has been said, that if one defendant alone cannot, under the act of Congress, remove a suit into the Circuit Court, the constitutional provision may be evaded at pleasure, as to suits between citizens of different States being cognizable in the courts of the United States; for persons may fraudulently be made nominal defendants for the very purpose of preventing a removal of the suit. If such a case should arise (for in this case it is not pretended) of a fraudulent joinder of parties for such a purpose, it would deserve consideration, whether the jurisdiction of this Court could be so evaded; and whether, in furtherance of justice, under such circumstances, the injured defendant might not have some remedy at law or in equity (by way of injunction or otherwise), to reach the mischief. But if the mischief in such a case should be admitted to be irremediable, that is a consideration properly addressing itself to the national legislature to provide suitable means of redress for it. It is not

for courts of justice *proprio marte* to provide for all the defects or mischiefs of imperfect legislation.

Upon the whole, my opinion is, that this suit must be remanded to the State Court. If I entertained any doubt upon the subject, the deliberate opinions of my brothers *Washington* and *Thompson* would be decisive with me. But I confess, that as an original question, I should have entertained the same view of the matter; and the weight of their authority ought, under these circumstances, to be quite conclusive with me.

Suit remanded to the State Court.

NATHAN LEVY, (FOR THE UNITED STATES), IN ERROR,

v.

DAVID BURLEY.

Where public officers are authorized by law to certify to certain facts, their certificates to these facts are competent evidence thereof.

A consul's certificate of any fact is not evidence between third persons, unless expressly or impliedly made so by Statute.

Quære, if a consul's certificate is evidence, that a ship's register was deposited with him, agreeably to the Act of Congress of 1803, ch. 62, § 2.

An information was brought in the name of the consul of the United States, for the Island of St. Thomas, suing for the benefit of the United States, against the defendant, to recover a penalty for not depositing with the consul the ship's register on her arrival at the port of St. Thomas, agreeably to the Act of Congress of 1803, ch. 62, § 2. *Held*, that the certificate of the consul was not admissible evidence, to prove the arrival or departure of the vessel.

Quære, if a consul, who sues for a penalty, in his own name and person, but for the benefit of the United States, is liable for costs.

Quære, if a party plaintiff of record, who has no interest in the suit, is a competent witness.

Quære, if an *information* is the proper proceeding in the present case, where the suit is not brought in the name of the government.

THIS was a writ of error, to the judgment of the District Court of the United States, for the District of Massachusetts. The

original suit was an information brought by the District Attorney, in the name of Nathan Levy, consul of the United States, for the island of St. Thomas, suing for the benefit of the United States, against David Burley (the defendant in error), master of the ship Redwing, to recover the penalty of 500 dollars, for not depositing with the said consul, the ship's register on her arrival at the port of St. Thomas, according to the requirement of the supplementary act, respecting consuls and vice-consuls, of the 28th of February, 1803, ch. 62. The defendant pleaded not guilty, upon which issue was joined and a verdict passed upon the trial, in his favor. A bill of exceptions was taken at the trial; from which it appeared, that a certificate of the said consul (the plaintiff), under the seal of his consulate, was offered in evidence, on behalf of the plaintiff, stating the fact, of the arrival and departure of the ship, at the said port of St. Thomas; and that the defendant, Burley, neglected and refused to deposit the register of the ship in the hands of the consul. The certificate being objected to, as evidence, the learned Judge of the District Court ruled, that the certificate was evidence, that the defendant Burley, did neglect to refuse to deposit the register with the consul, but that the same was not admissible to prove the arrival and departure of the ship from the port of St. Thomas. To this opinion, the plaintiff filed his bill of exceptions; and the question now presented to the Court, was whether the certificate was admissible, for the purpose of proving such arrival and departure.

Mills, District Attorney, for the plaintiff, argued, that the plaintiff in the present case, not being liable for costs, was a competent witness, though a party to the record. No objection can be taken, because the certificate is not sworn to, as the consul is a public officer, acting under his oath of office. The District Judge admitted it as evidence, that the register was deposited; but not of the arrival of the vessel. It would seem to be *primâ facie* evidence of the arrival of the vessel, as con-

suls are *ex officio* bound to take notice of the arrival and departure of American vessels. He cited, Act of Congress of 1803, ch. 62, § 2.

Shipley, e contra, for the defendant, contended, that the plaintiff, being a party to the suit, was an incompetent witness, though not liable to costs. The statute makes it the duty of the consul, to prosecute in an alleged case like the present, but does not make him a competent witness. His certificate is not evidence of any fact, except what is within the consular functions. *Church* v. *Hubbard*, 2 Cranch R. 237; *United States* v. *Mitchell*, 2 Wash. C. R. 478; *Catlett* v. *Pacific Ins. Co.*, (1 Paine R. 610). The consular functions are enumerated in the statute. According to this, the consul is not bound to keep a record of arrivals. The *ninth* section of this statute, expressly makes his certificate evidence in certain cases. This express provision excludes the conclusion, that it is competent evidence, in cases not provided for. The statute, moreover, is a penal statute, and to be construed strictly.

Story J. The Act of 1803, ch. 62, § 2, provides, that it shall be the duty of every master of a ship belonging to the United States, on his arrival at a foreign port, to deposit his register, &c. with the consul or other commercial agent of the United States at such port; and in case of his refusal or neglect, he is to forfeit and pay 500 dollars, to be recovered by the consul or other commercial agent; "in his own name, for the benefit of the United States, in any court of competent jurisdiction." No provision is made, as to his certificate of the fact being evidence of such refusal or neglect, or of the arrival, or of the departure of the vessel. But in another section of the Act, (§ 4), it is expressly provided, that the certificate of the consul under his hand and seal shall be *primâ facie* evidence of the refusal of the master of an American ship to receive destitute seamen on board, according to the requirements of that section.

The maxim of law might, therefore, very properly be here brought into view; *Expressio unius est exclusio alterius*; and, certainly, an express provision, in such a case, would not be without its weight in giving a construction to such an omission, in a statute of this sort.

There is no doubt, that certificates and other documents made by a public officer, entrusted with authority for that purpose, are to be treated as public documents, and as such, are evidence against all persons (to the extent of the officer's authority), of the facts, which he is directed to certify. But the difficulty in the application of this doctrine to the circumstances of the present case is, that neither this statute, nor any other statute of the United States, has made it the duty of the consul to certify any such facts; and, therefore, the reason fails. On the other hand, the general rule of law is, that all evidence must be given under oath, and in the very case in controversy. The exceptions to this rule are well known; and, here again, the difficulty is to bring the present case within the reach of any of these exceptions. I do not find, indeed, that any Act of Congress has required consuls to take an oath for the faithful performance of the duties of their office, although, in common with all other officers, they are required to take an oath to support the Constitution of the United States. So, that here, there is a certificate offered, not only not under oath, and not provided for by any statute, but open to the grave objection, that it is not even by an officer, sworn to the faithful discharge of duty.

In addition to these suggestions, it is proper to state, that it is not shown to be any part of the official duty of a consul to keep a memorandum of the arrival or departure of American vessels at or from the port, for which he is appointed. If it were a part of his duty to do so, it would by no means follow, that his certificate of the fact would be evidence in a court of justice; for there would be better evidence behind, that is to say, his own deposition on oath, giving the opposite party a right of cross-

examination. The case of *Waldron* v. *Crombe* (3 Taunt. R. 162),[1] shows, that the certificate of a consul on a matter of fact, clearly within the line of his duty, is not evidence. The case of *Church* v. *Hubbard* (2 Cranch R. 237), shows with what strictness the law acts in relation to a consular certificate. It was there rejected, as proof of the existence of a foreign written law annexed thereto. On that occasion, Mr. Chief Justice *Marshall*, in delivering the opinion of the Court, said, "There appears no reason for assigning to their (consuls) certificates respecting a foreign law any higher or different degree of credit, than would be assigned to their certificates of any other fact." This language seems to me to justify the conclusion, that a consul's certificate of any fact is not evidence between third persons, unless expressly or impliedly so made by statute; for it is in derogation of the rules of evidence of the common law. In the case of *The United States* v. *Mitchell* (2 Wash. C. R. 478), my late brother, Mr. Justice *Washington* (a truly able and cautious judge), admitted a consul's certificate to be evidence, that the ship's register was deposited with him; but he rejected it as to all other facts. I do not now meddle with this point; because it is not necessary to the decision of the case before the Court; and there may be good reason to hold, that the certificate, in relation to an official fact, of which the consul may have exclusive knowledge, may be properly admissible, when, as to all other facts, it would be inadmissible; because they might admit of proof *aliunde*, or even of proof of a higher nature. If the certificate in this case had been of the positive deposit of the register, and were admissible as evidence of that fact (as Mr. Justice *Washington* held it was), then I should have no doubt, that it was *primâ facie* evidence of the arrival of the vessel; for it would be a natural presumption, that it was deposited by

[1] See also *Roberts* v. *Eddington*, 4 Esp. R. 88; *Drake* v. *Marryatt*, 1 B. & Cresw. 473, 476.

the master in the ordinary discharge of his duty. But where the certificate is merely negative of the non-deposit, of the register, it would seem at most to establish only its own verity. It would afford no presumption of the arrival and departure of the vessel; for it would be quite consistent with the fact, that the vessel had never arrived at the port. Indeed, the presumption from such non-deposit would be, that the vessel had never arrived at the port; for the law will not presume a violation of his duty by the master. It must be established by competent proofs.

Now, I do not well see, upon any established principles of evidence, how the certificate of the consul of the fact of the arrival or of the departure of the vessel was admissible as proof of the fact. It is not proof under oath. It is not authorized by any statute. It is not made any part of his official duty to keep a memorandum or record of such facts. They are not facts peculiarly or officially within his knowledge. They are susceptible of perfect proof from a great variety of other sources. It does not appear to me, that it is a case, which, upon principles of public policy, or otherwise, calls upon the Court to relax the rules of evidence, which are the great security of the rights and interests of all persons. In the case of *Dunbar* v. *Harvie* (2 Bligh R. 351), the House of Lords held a certificate of an officer of excise, as to matters within the scope of his official knowledge and duty, not admissible evidence. And I do not find, that upon that occasion, any authorities were adduced, having the slightest tendency to shake the rule as to the non-admissibility of the certificates of public officers generally. My judgment is, that the decision of the District Judge was, upon general principles, correct; and that the judgment ought to be affirmed.

It is unnecessary to decide the other point raised in the case; and that is, whether the certificate, if otherwise admissible, is not incompetent evidence, because it is the certificate of the plaintiff on the record. The argument is, that though he is a plaintiff upon the record, he has no interest, as he sues under

the authority of a statute for the sole benefit of the United States, and he is not liable for costs. As to the non-liability for costs, I am not aware, that that point has ever been directly decided. The plaintiff here sues in his own proper name and person, and not merely by his official name, as the Postmaster General does, under the act of 1810, ch. 54, s. 29, or the act of 1825, ch. 275, s. 31. And there may be a distinction in the cases. Suppose a bond given to a person "for the use of the United States," and the obligee sues, is he of course to be exempted from the payment of costs? That has never yet, to my knowledge, been decided; and I give no opinion upon it. But the more enlarged question is, whether a party plaintiff of record, although he has no interest in the suit, can be admitted as a competent witness. I am aware, that my late brother, Mr. Justice Washington, in *Willing* v. *Consequa* (1 Peters Cir. Rep. 307), held that he may. But I also know, that that decision has not been thought entirely satisfactory; because, it has been suggested, he is disabled by law, from the mere circumstance of his being a party, without any reference to his ultimate interest, as a party, to give testimony in his own cause. Upon this also I give no opinion.

There is another question arising out of the record, which has not been argued; but upon which, nevertheless, I wish to suggest my own doubt, and that is, whether an *information* by the District Attorney will lie in this case. The result, to which I have come, renders it unnecessary to decide the point. But I ought not to disguise, that I think it difficult to maintain an information, upon the terms of the statute, or for the penal objects, which it is designed to enforce. I do not remember a single case, in which an information for a penalty has been maintained, except where the suit has been brought in the name of the government itself. *Judgment affirmed.*

United States in Error v. a Chain Cable. William Eager, Claimant.

Appurtenances or equipments of a ship, as a chain cable, or other articles, purchased *bonâ fide* for the use of the ship, are not "goods, wares, or merchandize," within the meaning of the Revenue Act of 1799, ch. 128, s. 50, which require a permit before they are landed.

Information of forfeiture and seizure on land of one chain cable, for having been unladen and delivered from the ship *Marathon*, at the port of Boston, without a permit, against the Collection Act of 1799, ch. 28, s. 50. The cause was tried in the District Court, at September term, 1835, upon the general issue, by a jury, and a verdict was found for the defendant. At the trial a bill of exceptions was filed by the District Attorney, the substance of which was as follows:

It was proved, that the cable in question was purchased at Liverpool by the master of the ship Marathon, during the last season, to supply the place of a steam hempen cable, which had become unseaworthy before the arrival of the ship at Liverpool, that the purchase was made *bonâ fide*, with the intention of using said cable for that ship, and not to sell as merchandise. That the cable was stowed in the usual place, without any concealment, and on the arrival in Boston, the ship was secured by the said cable to the wharf. A few days after the arrival of the Marathon, the same claimant, William Eager, had another ship about to be launched at Medford, and a list of articles was furnished by the ship's carpenter to be used in the launching and bringing said vessel to Boston, among which were a chain cable, sails, blocks, &c. &c. The mate of the Marathon, who then had charge of her, agreed, with the knowledge and concurrence of said Eager, to loan from the Marathon, said chain cable, sails, blocks, &c. to be used for the purpose aforesaid, but afterward to be returned to the ship as soon as the launch-

ing was over; and he, the mate, accordingly caused the said chain cable to be landed, to be taken to Medford by the wagoner, as also the other articles referred to from the ship. The next day, or the day after, the teamster took the said sails and blocks to Medford by one team, he being unable to carry the chain cable on the same load, and, on Saturday following, about noon, loaded the chain cable into his wagon, carried it out to Medford; and while he was landing it at Medford, and before it was entirely out of his wagon, the said chain cable was seized by the custom house officers, and brought back to Boston. The said chain cable was soon after bonded, and put on board the Marathon.

And the Attorney for the United States requested the honorable Judge to instruct the Jury, that the cable could not lawfully be loaned or used for the purpose aforesaid, and that the collector of said port had authority to make the seizure. But the Judge refused so to instruct the jury. On the contrary thereof, the jury were instructed, if they believed the purchase of said cable was *bonâ fide*, and necessary, and proper, the mere casual loan of it, to be used for the purpose before stated, would not subject it to be seized, unless they belived the proposed use was colorable merely. He further instructed the jury, that although the cable was to be considered a part of the ship, yet if it was separated from it with an intention of selling or using it for another purpose, and not restoring it to the ship, that might be an unlawful use, which might subject it to seizure. But he left it for the consideration of the jury, whether, at the time and place when the cable was landed, or when the seizure was made, they could infer that there was any such intention of diverting, permanently, the use of the cable, and separating it from the ship Marathon.

The said Attorney further requested his Honor, the Judge, to instruct the Jury, that if it were lawful for the claimant to loan or use said cable, for the purpose aforesaid, it could not be

legally landed for that purpose, without a permit from the proper officers of the port aforesaid. But the said Judge refused so to instruct the jury: On the contrary, the jury were instructed, that the claimant had the right to make a temporary loan of the cable, for the purpose aforesaid, without any permit, and that the mere casual temporary loan of the cable for any such purpose as the one supposed, no more required a permit, than to carry a sail to a sailmaker to be mended, or a chain cable to the smith for the same purpose, or any other part of the ship's tackle or apparel, which required repairs. But it was for the jury to consider, whether the loan of the cable for the purpose aforesaid, was, or was not, colorable upon the evidence in the case.

Judgment being rendered according to the verdict, the present writ of error was brought to the Circuit Court; and was argued at this term by *Mills*, District Attorney for the United States, and by *J. P. Cooke* for the claimant.

Story J. In my judgment the whole point in this cause resolves itself into this; whether the chain cable in controversy was, at the time of its arrival and importation into the United States, *bonâ fide*, a part of the equipments and appurtenances of the ship Marathon. If it was, then it is clear to me, that no forfeiture is incurred. If it was not, then the case must be treated as an attempted evasion of the Revenue Collection Act of 1799, ch. 128, and the forfeiture consequently attaches. It appears from the evidence, that the chain cable was purchased at Liverpool, in England, to supply the place of a steam hempen cable of the ship, which had become unseaworthy; and the purchase was made, *bonâ fide*, for the use of the ship, and not to sell as merchandise; and it was used for the ship on her arrival at the home port. Now, the question of *bonâ fides* was directly put by the learned Judge of the District Court to the jury, and they have affirmed it by their verdict. The only ground,

then, open to controversy, is, whether the directions given by the Court, and the refusal of the instructions prayed by the District Attorney at the trial, were correct and justifiable in point of law.

I think they were correct and justifiable. If the chain cable was *bonâ fide* purchased, and *bonâ fide* an appurtenance of the ship, at the time of the arrival and importation thereof, it is clear, that the owner might lend it and loan it, as he should please, without any permit. The provisions of the revenue laws do not require any permit to be given before the landing of any of the ship's appurtenances or equipments. If a new sail had been necessarily purchased abroad for the ship's use, to supply an old sail, worn out, or lost on the voyage, it will scarcely be pretended, that it required a permit in order to be landed, or that though composed of dutiable articles, before it was made up, the sail would, upon the ship's coming to the home port, be liable to duties.

It is possible, that evasions of the revenue laws may sometimes occur, under color of procuring new sails, or rigging, or equipments of our ships in foreign ports; and, thus, the party may escape from the payment of the proper duties on the articles thus imported, and introduced into the country. But, the defect, if any, is to be cured by legislation, and not by the courts of law. Until Congress shall declare, that the new rigging or equipments of a ship, procured abroad, are dutiable, or not to be landed without a permit, it seems to be difficult to conceive, how courts of justice can treat them as "goods, wares, or merchandise," within the meaning of the general revenue laws. The "goods, wares, and merchandises," within the provision of the 50th section of the Revenue Collection Act of 1799, ch. 128, are such only as are designed for sale, or to be applied to some use or object, distinct from their *bonâ fide* appropriation to the use of the ship; in which they are imported. Upon any other construction, not only every sail, rope,

yard, or other appendage of the ship, purchased for the immediate use of the ship, and from an obvious necessity, in a foreign port, would be liable to the ordinary duty acts; but even the common tables, chairs, wares, and provisions, for the daily accommodation of the ship and her crew, would fall under the like predicament, and could not be landed without a permit. It is impossible, in my judgment, to contend, successfully, for such a construction of our existing revenue laws. And yet I know not, how, upon principle, to distinguish between the case put, and the case now at the bar.

Upon the whole, my opinion is, that the judgment of the District Court ought to be, and hereby is affirmed.

JOHN S. DONNELL AND OTHERS

v.

THE COLUMBIAN INSURANCE COMPANY.

A party should require the Master, or Auditor, to report specially such evidence, as furnishes the ground of any exception. And the Court will not open the facts of the report, unless to correct some unquestionable error.

There is no rule or presumption of law, which makes the seaworthiness of a vessel at the commencement of the voyage *primâ facie* evidence, that the subsequent repairs, necessary to be made during the voyage, arose from some extraordinary peril. Otherwise, the underwriters might be made liable for losses for mere wear and tear.

The necessity of repairs, in the course of the voyage, on account of mere wear and tear, does not impair the original warranty of seaworthiness.

Where a verdict was taken against the defendants by consent, subject to the report of auditors, in order to ascertain the amount of the loss suffered by the plaintiffs; *Held*, that the defendants, by this course, only admitted, that the plaintiffs had some cause of action, and did not preclude themselves from any inquiry into the cause and nature of the loss, and the amount, which was attributable to the perils insured against.

A payment of money into Court admits the contract and damages only *pro*

tanto; and, if the plaintiff does not establish more at the trial, he must be nonsuited, or have a verdict against him.

In a policy of insurance, it was stipulated, that the underwriters shall not be liable "for any partial loss on other goods, or on the vessel and freight, unless it amount to five per cent. exclusive *in each case* of all charges and expenses incurred for the purpose of ascertaining and proving the loss;" *Held*, that the words "in each case," in the foregoing clause, do not mean "at each time of loss," but that they refer to the three several subjects insured, goods, freight, and vessel, and require a damage of five per cent. to justify a claim in each case.

Held, that successive losses on the *cargo*, in the course of the voyage, each less than five per cent.; but in the aggregate amounting to more than five per cent., are not within the exception, and are to be borne by the underwriters.

Semble, that the same rule prevails with regard to losses on the *ship*.

Semble, that this rule prevails among the commercial States of the continent of Europe.

Usages among merchants should be sparingly adopted as rules of law by courts of justice, as they are often founded in mere mistake, and in a want of comprehensive views of the full bearing of principles.

Semble, that in questions of commercial law, the courts of the United States are not concluded by the local construction proceeding from the State courts.

Quære—If a distinction exists between successive losses by the same peril in the same voyage, and successive losses by different perils in the same voyage.

ASSUMPSIT on a policy of insurance, dated on the 23d of June, 1828, whereby the plaintiffs caused themselves to be insured, lost, or not lost, "$4,500 on the ship *United States*, and $10,500 on property on board said ship, valued at 5 per cent. above the costs and charges, per invoice, at all periods of the voyage, at and from Baltimore, to, at, and from all ports and places, in any order of succession, one or more times to the same, between Valparaiso and Guyaquil, both inclusive; at and from thence to port or ports in Manilla and Java, and at and from thence to port of discharge in Europe or the United States, either, but not both, with liberty to stop on her passages for advice, trade, and refreshment; risk to commence May 9, 1828, at noon. In case the United States returns from the Pacific to

Baltimore, the risk to be covered by the policy;" at a premium of 5 per cent. per annum, to add one per cent. if said ship should be north of the straits of Dover between the first of November and the first day of March. Ship valued at $15,000, not including premium. The policy, after enumerating the usual risks, contained the following, among other provisos; "Provided, that the assurers shall not be liable for any partial loss on sugar, &c., unless the loss amount to 7 per cent.; nor for any partial loss on salt, &c. or other goods, which are esteemed perishable in their own nature, unless it amount to 7 per cent. on the aggregate value of such articles, and happen by stranding; *nor for any partial loss on other goods, or on the vessel or freight, unless it amounts to 5 per cent. exclusive in each case of all charges and expenses incurred for the purpose of ascertaining and proving the loss;* but the owners of such goods shall recover on a general average."

The declaration alleged, that in the course of the voyage insured, and while the ship, with her cargo (of coffee) on board, was proceeding from Batavia to Antwerp, she was greatly injured by stormy and tempestuous weather, &c., and was compelled to put away for the Isle of France, where she arrived; that the cargo was wetted and damaged by the storm, and the plaintiffs put to great expense in saving and unlading the cargo, and repairing the ship; and part of the cargo was spoiled; that the ship, after she was repaired, sailed, with the residue of the cargo, for Antwerp, and on the 15th of December, 1829, was, by the force of the winds and waves, and ice and currents, driven on certain shoals in the river Scheldt, and was thereby greatly injured, and the cargo greatly wetted and damaged, &c.

At the trial on the general issue, a verdict was, by consent, taken for the plaintiffs, for the sum of ——— dollars, subject to the opinion of the Court upon the report of auditors appointed by the Court.

The auditors made a special report, in which they disallowed

certain charges, ranked by them, as class fifth of charges for repairs on the ship, viz. materials for the deck, stanchions, rails, wales, &c., and labor incident thereto. The following extract from their report, in relation to these items, will elucidate the opinion of the Court. "The evidence in relation to this class of charges is very imperfect. If the admission or proof of seaworthiness establishes every part of the vessel to be sound at every stage of the voyage, injury by perils insured against excepted, then the fact, that the stanchions and rails were broken, and the deck planks and side planks near the wale needed replacing or repairing, might of itself be considered to be evidence of some extraordinary peril, for which the underwriters are answerable. But if the establishment or admission of the seaworthiness of the ship, at the commencement of the voyage, still leaves open the inquiry, whether particular repairs in the course of the voyage were rendered necessary by the perils insured against, or by decay or by defects, or by wear and tear, as the auditors suppose to be the case, then the establishing of the fact of the necessity of the repairs does not, as the auditors suppose, throw upon the underwriters the burthen of proving that the necessity for the repairs arose from some other cause than the perils insured against; but on the contrary, they presume, that the assured must show, by some further evidence than the mere fact of the necessity of the repairs, that they were rendered necessary by the damage occasioned by the perils insured against. In regard to the present class of charges, the auditors do not find any evidence in the log-book or deposition of the master, or other documents, that these repairs were of damage occasioned by perils of the seas, other than the evidence, if any, arising from the kind of injuries or defects, which required repairs. Had the vessel been new, the mere fact of these repairs being needed, might itself have been sufficient ground of inference, that a peril within the policy was the cause. But considering, that she was eighteen years old; that neither the log-

book, nor the captain's deposition state that these parts of the vessel were damaged in consequence of a storm or by perils of the sea, nor state any fact from which such cause of damage can be inferred; and considering, that holes were picked in the waterways by the carpenter, before going into Mauritius, showing, as the auditors suppose, the defective or decayed state of the part of the vessel in which some part of these repairs were made, and considering also the apprehension of the men in regard to going on in the vessel, the auditors conclude, that this class of charges is not shown to have been incurred in consequence of the operation of any peril within the policy."

And now, at this term, the case was argued upon certain exceptions taken to that report, by *Benjamin R. Curtis* and *Fletcher* for the plaintiffs, and by *Hubbard* for the Insurance Company. The grounds taken by the learned counsel will sufficiently appear in the opinion of the Court.

Story J. No question is now before the Court, as to any loss on the ship, as far as it is allowed by the auditors, or as to any general average, both of these having been admitted or adjusted between the parties. But the auditors have disallowed certain charges, enumerated in their report, as class fifth of charges for repairs on the ship, viz. materials for deck, outside, stanchions, rails, wales, &c., and labor incident thereto. Upon these items the auditors, in their report, made the following remarks. [Here the Judge repeated them.] Now, in this view of the matter, the counsel for the plaintiffs object to this part of the report, upon two grounds; first, that the auditors have drawn a wrong conclusion, in point of fact, from the evidence submitted to them on these charges; secondly, that, in point of law, the seaworthiness of the vessel at the commencement of the voyage is *primâ facie* evidence, that all subsequent repairs, necessary to be made during the voyage, did arise from some extraordinary peril; and, therefore, the auditors were bound so

to consider it, at least in the absence of all contradictory and controlling evidence. Unless these items of charges are allowed, there is no loss exceeding 5 per cent. on the ship; and hence arises the importance of considering them in the cause.

As to the first point, it is not now properly before this Court upon the report. The auditors have not reported, what the evidence was before them upon this matter; nor did the plaintiffs require them to report it specially, as they ought to have done, if they meant to bring the conclusion of the auditors under the review of the Court. The report of the auditors is in the nature of a report of a Master in a suit in chancery; and, when exceptions are to be taken to the latter, the evidence, which furnishes the ground of the exceptions should be required, by the party excepting, to be stated by the Master; for otherwise the Court will not wander at large into the evidence in order to ascertain, whether, by possibility, the Master was wrong in his conclusion or not. Still, however, as this is a mere mistake in practice, if the Court were now satisfied, that the auditors had committed a gross and palpable error in any matter of fact to the injury of the plaintiffs, I should feel it a duty to recommit the report, in order that such an error might be corrected. But if it be a matter of fair doubt, or a conclusion upon evidence in its own nature ambiguous and uncertain, upon which different persons, equally impartial and intelligent, might entertain different opinions; there the Court will not substitute itself for the judgment of the auditors, any more than it would for the judgment of a jury, even though it might not perhaps have originally arrived at exactly the same conclusion. It is sufficient for the Court to abstain from any interference, as to a matter of fact, that it is not clearly satisfied, that there has been an unquestionable error. My opinion is, in the present case, that there is no such error.

Then, as to the point of law. I agree, that the verdict admits the seaworthiness of the ship for the voyage from Batavia to Antwerp. But, in my judgment, it furnishes no sufficient

ground to say, that all repairs, which may incidentally become necessary or proper in the course of the voyage, are therefore to be attributed to the extraordinary perils insured against. It is clear, that the underwriters are never liable for losses occasioned by the mere wear and tear of a ship during a voyage. Unless it can be established, that no losses by mere wear and tear can occur during a voyage, which it may be necessary or proper to repair, consistently with the warranty of seaworthiness, there is an end of the argument. I know of no such presumption of evidence, and no such principle of law. On the contrary, I have always supposed, that there may be many small repairs, necessary and proper in the course of a voyage, from mere wear and tear, the existence of which would not impair the warranty of seaworthiness. Suppose some of the timbers of a ship are decayed, and yet not to such a degree as to destroy her seaworthiness; and repairs should be necessary in that part of the ship from any extraordinary peril, without absolutely requiring that timber to be removed; it might be matter of great propriety, and in a general sense necessary and proper, to take out such timber; and yet the underwriters might not be liable for the loss. As I understand the law, the underwriters are not liable for any repairs or losses on a ship, not properly occasioned by, or attributable to some peril insured against. The mere fact, that repairs are made by a master in the course of a voyage, in the exercise of his discretion (which discretion is always confided to him to some extent by law), can furnish of itself no proof, that those repairs were indispensable, and far less, that they were required by some extraordinary peril. Such repairs must often be made in the exercise of a sound discretion, and with a prudent view to the interests of the owner. In every case, in which the assured seeks to recover for such repairs against the underwriters, he must show, not only that they were proper and necessary, but that they became so from the extraordinary perils of the voyage within the policy. The loss is

like every other loss within the policy. The *onus probandi* is on the assured to establish it by competent and satisfactory proofs, before he is entitled to recover it. It appears to me, therefore, that the auditors were, under these circumstances, perfectly correct in their view of the law.

But it is said, that the defendants have precluded themselves from any inquiry of this sort, by consenting to take a verdict against them; for that admits, that the plaintiffs have sustained some loss; and if so, then the only thing for the auditors to do, was to ascertain the amount of the loss, not to ascertain the cause of the loss; for the verdict admitted that. The case has been likened to the case of payment of money into Court upon a policy, which not only admits the loss, but the cause of the loss as stated in the declaration; and for this the case of *Waldron* v. *Coombe* (3 Taunt. R. 162) has been relied on.

It appears to me, that the argument is not maintainable, either upon principle or upon authority. By consenting to take a verdict against them, subject to the report of auditors, the defendants have done no more than admit, that the plaintiffs had some cause of action against them, and had sustained some loss or damage within the perils of the policy. The quantum of that loss or damage is precisely what the auditors were appointed to ascertain, as substitutes for the jury. The latter, upon the trial, would have been bound to find, not only that there was some loss, but the nature and extent of that loss. If the defendants had admitted, before the jury, that the plaintiffs were entitled to recover some loss or damage, the inquiry would still have remained, what loss, and what damage; and that could be ascertained only by ascertaining the loss and damage properly attributable to the perils of the sea. The very same duty has now devolved upon the auditors. They are to ascertain, not what loss or damage has been sustained by the plaintiffs, but what loss or damage by the perils within the policy, and for which the underwriters are properly answerable. By referring

the amount to the judgment of the auditors, it could never be supposed, that the defendants intended to make themselves liable for losses or damages not within the scope of the policy.

As to the case of *Waldron* v. *Coombe* (3 Taunt. R. 162), it turned upon other considerations, and does not in any manner touch this doctrine. It is admitted, that payment of money into Court admits, that the plaintiff has a good cause of action to that amount upon the peril specified in the declaration. Thus, for example, the payment of 50 per cent. into Court upon a declaration on a policy, alleging a loss by perils of the seas, admits a loss by such perils to that amount; but not beyond it. The argument in *Waldron* v. *Coombe* was not, that the plaintiff, without proof, could recover beyond the 50 per cent. paid into Court; for proof was offered of that. But the argument for the defendant was, that the plaintiff "had not, in fact, even proved, that there had been a storm or an hour's foul weather during the voyage." Now, the declaration averred a loss by perils of the seas. And Lord Chief Justice *Mansfield* said, in answer to the argument, "The payment of money into Court admits the storm." He did not say, that the payment admits all the loss claimed to have been by storms. And *Lawrence* and *Heath*, Justices, added, with reference to the evidence; "No facts are laid before the Court, from which we can infer, that the defendant could put himself in a better situation, if he had the advantage of a new trial." So that the Court did not touch the point now in judgment; but the verdict was confirmed upon other grounds. Nothing, indeed, is better settled than the rule, that payment of money into Court admits the contract and damages only *pro tanto*; and if the plaintiff does not establish more at the trial, he must be nonsuited, or have a verdict against him.[1] The case of *Rucker* v. *Palsgrave* (1 Taunt. R. 419) is a direct

[1] *Rucker* v. *Palsgrave*, 1 Taunt. R. 419. *Gutteridge* v. *Smith*, 2 H. Bl. 374.

authority to this very point of payment of money into Court for a loss upon a policy. My judgment is, therefore, with the auditors on this point; and this disposes of the partial loss on the ship; for, under these circumstances, it does not amount to 5 per cent.

We come, in the next place, to the consideration of the real and difficult question in the cause; and that is, whether, under the exception in this policy, the plaintiffs are entitled to recover for two partial losses occurring to the cargo at two different points of the return voyage, each less than 5 per cent., but in the aggregate amounting to more than 5 per cent. The language of the policy is, that the underwriters shall not be liable "for any partial loss on other goods, or on the vessel, or freight, unless it amount to 5 per cent., exclusive, *in each case*, of all charges and expenses incurred for the purpose of ascertaining and proving the loss." In the argument at the bar, some criticism has been employed to establish, that the words "in each case," in the clause, mean "at each time of loss," but, in my judgment, entirely without success. These words, in their true and proper meaning, apply to goods, vessel and freight, and require 5 per cent. damage to justify a claim in each case, that is, in case of an insurance on goods, on vessel, and on freight. If all three are insured in one policy, a loss of 5 per cent. on the cargo will not authorize a recovery for a loss on vessel, or on freight, unless the loss on them be also 5 per cent.

What then is the true interpretation of this clause? Does it mean, that each single loss accruing at one and the same time, and, as it were *uno flatu*, should amount to 5 per cent., or only that all the aggregate losses on the subject-matter during the voyage should amount to that sum? If I had been called upon to give a construction to this clause, wholly independent of authority or usage, I confess, that the strong inclination of my mind is, that I should hold it to apply to an aggregate of losses during the whole voyage, and not to a loss of 5 per cent. at any one time,

or by any one continuous peril. My reason is, that the general words of the policy apply to all losses, during the voyage, from the perils insured against. The exception is, of all losses not amounting to 5 per cent., which (it seems to me) naturally means all losses during the voyage, not all losses at a particular time, or on a particular occasion in the course of the voyage. The exception is carved out of a general liability for all losses. It is an exception of the same nature as the general liability; and it saves the party from all such losses, if they do not amount to 5 per cent. There are no qualifying phrases, as to the time, or manner, or occasion of the loss; and I do not well see, upon what grounds a Court can add to, or qualify the words. The general words make the underwriters liable for all losses, however numerous, in the voyage; not for each separately, as an independent loss; but for all in the aggregate. The exception (as I think) excepts all losses *ejusdem generis* below 5 per cent., that is, not amounting in the aggregate to 5 per cent. If the exception meant to cover a particular class of losses, different from those included in the general words in any respect, it would have been natural, that some qualification should have accompanied them. The absence of such a qualification negatives any intention to make it.

I agree, that the intention of the exception was, to guard the underwriters against trifling losses occurring in the voyage, which should be borne by the assured, as coming within the common meaning of wear and tear. But I think, also, that it was the very basis of the exception, that the aggregate of losses, not exceeding 5 per cent. in the whole voyage, were fairly attributable to mere wear and tear. But if the other view of the exception is to prevail, the assured might in a long voyage, as for instance, to India, meet with losses from four or five successive storms, each of which might be less than 5 per cent. damage; but the aggregate of which might amount to nearly 20 per cent. It appears to me incredible, that a succession of losses of

this sort should not be intended to be covered by the risks of the policy. A ship, valued at $20,000, might, in a succession of gales, be stripped of most of her sails, and even lose her masts, and yet no one gale might have done damage equal to $[illegible]000, while the aggregate might be $5000 or $6000.

But the case does not stand unaffected by usage and authority; and therefore, it is necessary to consider the question with reference to both. As to the usage in this State, there is no evidence before the Court; and the statements at the bar are of opposite characters, leading to the conclusion, that there is no uniform and well established usage in our mercantile community. And, if there were, I am among those judges, who think usages among merchants should be very sparingly adopted, as rules of law, by courts of justice, as they are often founded in mere mistake, and still more often in the want of enlarged and comprehensive views of the full bearing of principles. The usage in England, or rather, as it should be stated, at Lloyd's in London, is, as we are informed by Stevens and Benecke, to construe the words of the memorandum in English policies, "And all other goods, also the ship, and freight, are warranted free of average under three per cent. &c.," to mean, three per cent. by one accident, or at one time;[1] though it is by them, in terms, exclusively applied to averages on the ship. We shall presently see, how little that usage has been adhered to in the English courts of justice.

In the case of *Brooks* v. *The Oriental Insurance Company* (7 Pick. R. 259), which was an insurance on ship, with the usual exception of any partial loss, unless it should amount to five per cent., the Supreme Court of Massachusetts held, that the meaning was, that there must be five per cent. damage from disasters happening at one time, or in one continued gale

[1] See Stevens on Average, p. 401. Benecke on Average, p. 426, in Mr. Phillips's Edit. Boston, 1833.

or storm, considered by itself. And the Court seem to have founded themselves mainly in this decision on the English practice, as stated by Stevens in his work on Average. Now, although questions of commercial law are generally considered, as not justly included in that branch of local law, which the Courts of the United States are bound to administer, as the State Courts hold it to be; yet, such is my respect for the learning and ability of that Court, and my anxiety to follow the current of decisions upon commercial questions (as to which Lord Mansfield's remark is well founded, that it is less important, how they are settled, than that they should be settled), I should implicitly have adopted this doctrine on the present occasion, if it had been applicable to it. But my distress is, that the Court in that case expressly save the very point now in judgment; or rather, lead us to the conclusion, that this construction of the exception applies to the ship only, and not to the cargo. The Court said; "But it may be otherwise in regard to the cargo; because the actual damage received at different times cannot be ascertained during the passage, or when it happens; but only when the cargo is unladed."

Now, the reason, thus given for the distinction does not seem to me entirely satisfactory; nor can I well see, how the same words are to receive an entirely different construction, as to the different subject-matters of insurance, stated in the exception. The language is, that the underwriters are not to be liable, "for any partial loss on other goods, or on the vessel, or freight, unless it amount to five per cent." The loss then, must be five per cent. on the ship, five per cent. on the freight, five per cent. on the cargo. How it is to be ascertained; when it must occur; and whether at one time, or in the whole voyage; is not stated in the one case, any more than in the other. The difficulty of establishing in proof the nature or extent of the loss at any one time has nothing to do with the rule of construction of the words of the instrument. The question is not, how the loss is to be

established in either case; but whether it does in fact amount to five per cent. If, indeed, the intrinsic difficulty of ascertaining the damage at any one time to the cargo be a sufficient ground in point of general convenience, to repel the construction above stated, as to the cargo, it should repel it also, as to the ship and freight; for the words apply with the same force, and in the same connexion to each. Besides; it is often quite as difficult to ascertain the damage done at any one time to the ship, as to the cargo. The injury to the ship, done by a succession of gales, is often impracticable to be ascertained at sea, and, especially where there has been great straining, until after she has been overhauled in port. And where the direct damage done to a ship in a single gale is visible, and afterwards in other gales other injuries occur to the same things, or in the same places, it is, practically speaking, extremely difficult to ascertain the precise amount of the mischief done at any one time. Yet the injury may be of such a nature, as clearly to establish, that it is not mere wear and tear; and to avoid the latter, is what the learned Court thought was the true object and foundation of the exception. With the greatest deference, therefore, to the learned Court, I confess, that the reason assigned for the distinction rather leads me to doubt, whether the construction ought to have been adopted in regard to the ship. The rule, it seems to me, ought to work throughout, or not at all. Its inconvenience and difficulty, in application to the cargo are admitted; nay seem insuperable. Why, then, if not intended to be applied to the cargo, should we presume an intention to apply it to the ship, when in many cases the same inconvenience and difficulty would apply to the ship?

Mr. Phillips, in his excellent Treatise on Insurance (Vol. 1, ch. 18, p. 493, 494), lays it down as clear, that in practice, the doctrine is not applied to the cargo; but that successive losses in the voyage may be added to make the five per cent. His language is: "The amount of damage upon goods is usually

ascertained at the port of delivery; and no distinction can ordinarily be made in regard to the damage occasioned at different periods. If the whole damage exceeds the rate per cent. of the exception, the insurers are considered to be liable. It would, in general, be impracticable to distinguish damage to goods by the same peril, as perils by the seas, for instance, at different times." I agree to this reasoning; and it seems to me, in general, equally applicable to the ship. No one will pretend in regard to the ship, that if the degree of damage, done at any time to the ship, can be ascertained, one rule shall prevail; and if it cannot be, that a different rule shall prevail as to the ship. That would be, to make the rule depend upon the proof, and not the proof upon the rule. It would be to make the underwriters liable for successive losses on the ship during the voyage, where you could not ascertain the precise amount each time, or in each gale; and not liable, where each admitted of a distinct valuation, though the aggregate of the latter might be treble the former.

Mr. Phillips, also, states a distinction between successive losses by the same peril in the same voyage, and successive losses by different perils in the same voyage. With that distinction, I do not now intermeddle; for it is not before the Court. All I can say is, that it is not pointed at by the words of the exception, however reasonable it may be.

But the question, as to the ship has recently undergone a solemn adjudication in England. I allude to the case of *Blackett* v. *The Royal Exchange Insurance Company* (2 Crompton & Jerv. R. 244), where the Court of Exchequer held, that, under the usual words of the memorandum in English policies, "free from average under three per cent.," successive losses on the ship, at different periods of the voyage might be added, to make up the amount. Lord *Lyndhurst*, in delivering the opinion of the Court, put the case upon a general ground in the exposition of all instruments, and very properly applied to policies, that

words of exception in an instrument are to be taken (if doubtful) most strongly against the party, for whose benefit they are introduced;[1] and, according to that rule, held the underwriters liable. Now, this is a case, in its reasoning directly applicable to the present. The case (it is true) was that of the ship; but *a fortiori* the same considerations must, upon the grounds already suggested, apply to the cargo. I should have been glad, indeed, to have found the doctrine established upon some broader ground, than that of a mere technical rule of construction, satisfactory in itself, but still, in my judgment, sustained by more enlarged considerations. It has been intimated, that the clause in our policies differs from that in the English policies. In form it does; in substance it is the same, as to all the purposes of this exception.

A similar clause exists in foreign policies, and especially in policies in France. I have been induced, on this account, to examine the writings of the maritime jurists of that country to see, if a different rule prevails there. I cannot find, that it does. The point does not indeed seem ever to have been directly made. But this very silence, in a case of such common occurrence, is of itself expressive. Valin, Pothier, and Emerigon,[2] all use language, which leads to the conclusion, that the exception does not apply to successive losses to the stipulated amount, occurring at different periods of the voyage; but that the underwriters would be liable therefor; for they do not distinguish between cases of a single average, and cases of several averages in the voyage. The only practical point, which they discuss ap-

[1] *The Earl of Cardigan* v. *Armitage*, 2 B. & Cres. R. 197, 206. Shepp. Touch. 100. *Bullen* v. *Denning*, 5 B. & Cres. R. 847, 850, 851. Lofield's Case, 10 Co. R. 107, *b*.

[2] Emerigon Des Assur. ch. 12, § 44, n. 4, vol. 2, p. 3. Pothier Des Assur. n. 165. 2 Valin Comm. B. 3, tit. 6, art. 47, p. 113. Pothier Des Assurances, n. 162.

proaching near this, is, whether in case of an exception of losses, not exceeding three per cent. (or any other rate), if the loss in the voyage exceeds that sum, whether the whole loss is to be paid, or only the difference after deducting the three per cent. They agree, that the whole must be paid, for the reason given by Pothier, that the words, not exceeding three per cent., express only the condition, on which the underwriters are to pay the averages, *(les avaries)* or the case, in which they ought to be held liable. If there had been an exception, as to losses at different periods of the voyage, it would have been natural for us to have found it here stated. The modern commercial Code of France (Art. 408) provides, in exact conformity to the 47th article of the Ordinance of Lewis XIV. on the same subject,[1] that, unless the parties have otherwise agreed, a demand of average losses *(avaries)* is not admissible, if the general average do not exceed one per cent. of the total value of the ship and cargo; and if the *particular* average do not also exceed one per cent. of the value of the article damaged. All the commentators upon this article agree, that, when the underwriters are liable at all under this clause, they are liable for the full amount of the average without deduction.[2] None of them make the slightest allusion to any distinction between the aggregate averages of the whole voyage, and an average loss at a particular period. I have, therefore, silently drawn the conclusion, that in the commercial States of the continent of Europe the distinction is unknown, although most of their policies contain an exception similar in its principles to ours.

Upon the whole, my opinion is, that successive losses on cargo during the voyage, amounting in the aggregate to more

[1] 2 Valin Comm. Liv. 3, tit. 6, art. 47, p. 108, 113, 114.

[2] Pardessus Droit Comm. vol. 3, pt. 3, tit. 5, ch. 3, § 4, n. 860, p. 427. Locre Esprit de Code de Commerce, B. 2, tit. 11, art. 408; vol. 2, p. 535, 536.

than five per cent. are to be borne by the underwriters, and are not within the scope of the exception.

The plaintiffs are accordingly entitled to judgment, in conformity to the Auditors' report for these partial losses on the cargo. And, upon the principles already stated, they are not entitled to any partial loss on the ship, the aggregate not amounting to five per cent.

CAROLINE M. BETTES, IN EQUITY, *v.* FRANCIS W. DANA.

Upon a Bill of Revivor, the sole questions before the Court are, the competency of the parties, and the correctness of the frame of the bill to revive.

General objections to the original bill, grounded on its not showing a proper case for the interference of a Court of Equity, should be reserved till after the revivor of the bill.

The Administratrix of the defendant, in the original bill, and his infant son and sole heir, are proper parties against whom a bill of revivor may be exhibited.

BILL in Equity, by Caroline M. Bettes, a citizen of the State of Maine. The bill stated, that on November 8th, 1833, Henry H. Fuller was seized in fee of a certain piece of land in Boston, subject to a mortgage made by the said Fuller to Francis W. Dana, for $10,000; and to Samuel H. Mann, for $3,000; that Fuller conveyed the land in question to Mann, subject to the foregoing mortgages; that the said Dana, the present defendant, encouraged and advised Mann to make the purchase, and assured him that the title of Fuller was good, and clear of all incumbrances, except the mortgage to Dana, and fraudulently concealed from Mann certain attachments made by him, the said Dana, upon the estate; that Mann was wholly ignorant of these attachments, and afterwards paid to Dana the sum of 10,000 due on mortgage; that, February 26th, 1834, in consideration of $8,250, he conveyed the northerly half

of the land to William Hilliard, who subsequently conveyed his interest to Charles C. Little; that Hilliard and Little, at the time of their respective purchases, were wholly ignorant of the attachments by Dana; that Little, May 8th, 1835, conveyed the said land to the complainant, to secure a note for $7,295 49, who thereupon became seized thereof in fee and in mortgage; that the said note and mortgage remain to this day unsatisfied; and that the complainant, at the time of the conveyance to her by Little, was ignorant of the attachments made by Dana. The bill further stated the attachments by Dana, and the final execution and levies upon the land; but that the said Dana knowing that he had no valid title, having received formal possession, immediately left the land, and hath not since entered; but he still persists in asserting a title under the levies, whereby the complainant's title is, in the opinion of many persons, rendered doubtful, and she is prevented from disposing of her said mortgage for a full price, and raising the money secured thereby. That Dana declines to try his title by a suit at law, and the complainant cannot sue, because the said Dana is not in possession of the premises, and because without the aid of a court of equity she may be unable to prove the alleged frauds. The bill concludes with a prayer, that the said Dana may be restrained by injunction from conveying the said premises; that the said levies may be declared fraudulent and void as to the complainant; that the said Dana may be compelled to release to the complainant, or to the said Little, all his claim to the said land, and all his title acquired by the said levies, with warranty against all claiming under him; also, that the complainant may be quieted in her title, and for further relief.

Before the coming in of an answer, Francis W. Dana, the defendant, died, leaving a widow, Ann F. Dana, who was appointed administratrix, and one child, Charles F. Dana, an infant and sole heir. Against these persons a bill of revivor was exhibited, wherein it was alleged, that the said Ann was bound to

admit assets, or exhibit an account of the estate and the disposition thereof, and praying that the said Ann and Charles might show cause, why the suit should not be revived, and they be held to answer the original bill.

A demurrer was now put in to the bill of revivor by the said Ann F. Dana and Charles F. Dana, the latter appearing by his guardian, *ad litem*, Samuel Dana, duly appointed by the Court. The causes assigned for the demurrer were; 1st. that the bill did not open any case for discovery or relief; and did not show, that any discovery can be made by the present defendants, which can be available to the complainant; 2d. that the complainant has shown no title or interest in the subject-matter of the suit, which gives her any right to the discovery or relief prayed for, nor any damage sustained by reason of the matter complained of; 3d. that Charles C. Little should have been a party to the bill, and that the said Little, according to the statement of the bill, and not the complainant, has such title in the lands aforesaid as would entitle him to the relief prayed for; 4th. that there is an adequate remedy at law; concluding with the general allegation of other good causes.

The cause was shortly argued on the demurrer by *Dexter* and *Gardiner* for the defendants, and by *Fletcher* for the plaintiff.

Story J. It seems to me clear, that the demurrer must be overruled. The causes assigned for the demurrer, though in form addressed to the bill of revivor, are all in fact addressed to the original bill. Nothing can be more clear, than, that upon a bill to revive, the sole questions before the Court are the competency of the parties, and the correctness of the frame of the bill to revive. The present demurrer admits that Ann F. Dana is the administratrix of Francis W. Dana, the original defendant, and that Charles F. Dana is the infant son and sole heir of the deceased. The bill is proper against each of them, for they are both proper parties to meet the exigency of the original bill.

The objections now raised on the demurrer, if they can be raised at all, are properly matters to be objected to in the frame of the original bill after it is revived. I will not enter upon any decision of them in this interlocutory proceeding, although I confess, that, supposing the allegations of the bill to be true, there can be little doubt, that the bill in its substance, however defective in its form, contains sufficient matter to sustain the jurisdiction of this Court as a Court of Equity. Whether Charles C. Little ought to be a party, I do not decide, because it is not proper in the present stage of the cause; though it is difficult to see, upon the actual frame of the bill, what decree is, or can be sought against him.

Let an order be entered, that the bill do stand revived; and that the administratrix, and the infant do answer the bill, as they shall be advised. A guardian *ad litem* has, I believe, been appointed for the infant.

After the revivor, a general demurrer was put in to the original bill, containing, in substance, the same causes, which had been originally assigned against the bill of revivor; and they were again spoken to by the same counsel on each side.

Story J. Upon farther consideration I am well satisfied, that the case stated in the bill is sufficient to sustain the jurisdiction of the Court, and properly cognizable and remediable in equity. I have, therefore, no difficulty in overruling the demurrer, as to all the causes assigned in it, except that, as to the want of parties. It appears to me, that, upon the frame of the bill, Charles C. Little is a necessary party, he having a subsisting interest in the estate, as the immediate mortgagor, from whom the plaintiff derives her title as mortgagee, and having an equal interest with the plaintiff, to litigate the validity of the attachment made by the intestate, Dana. The demurrer, therefore, must be allowed, so far as it insists upon Charles C. Little being a party, and overruled as to the other causes.

CIRCUIT COURT OF THE UNITED STATES.

Summer Circuit.

RHODE ISLAND, JUNE TERM, 1836, AT NEWPORT.

BEFORE { Hon. JOSEPH STORY, Associate Justice of the Supreme Court.
{ Hon. JOHN PITMAN, District Judge.

JOHN HAMMOND *v.* CRAWFORD ALLEN.

The plaintiff, having a large claim against the government of Portugal, appointed the defendant his Attorney, "with power irrevocable," to demand and recover the same, and on 27th January, 1832, entered into an agreement with the defendant to allow him a large sum as commissions on his agreeing to use his utmost efforts for the recovery thereof. At the time this agreement was made, though wholly unknown to both parties, the Government of Portugal, by a treaty stipulation dated 19th Jan. 1832, had allowed and liquidated the plaintiff's claim, so that nothing further remained to be done in the premises. *Held*, that this was a case of mutual mistake going to the substance of the contract and making it void, or voidable in Equity; and a decree was accordingly made that the agreement above-mentioned be delivered up and cancelled, and that a perpetual injunction issue to prohibit the defendant from asserting any title at law or equity under the same.

In the case above-mentioned nothing but a clear and unequivocal ratification of the agreement, after full deliberation and a complete review of all the material circumstances, would be held satisfactory by a Court of Equity.

A mistake of facts going to the essence of a contract avoids it.

Semble, that, if the power of attorney above-mentioned was intended to be a security, in the nature of a lien, to the defendant for his commissions, it

would be a power coupled with an interest, though not so in the ordinary sense of those terms.

Semble, that a recovery may be had upon a policy of insurance on a ship or cargo for a certain voyage, where the loss has already occurred at the time of executing the policy, and is unknown to both parties, even though the policy does not contain the common words "lost or not lost."

BILL in Equity to set aside an agreement founded in a mutual mistake of important facts.

The bill prayed, among other things, that a certain power of attorney, and a certain agreement between the complainant and defendant mentioned in the bill, might be decreed to be delivered up to the complaint to be cancelled. The material facts in the pleadings are as follow:

The power of attorney referred to was an irrevocable power from Hammond to Allen, to receive from the government of Portugal, or of the United States, and of and from all and every person and persons whomsoever, a certain claim or demand which said Hammond had for and on account of the capture and condemnation of the American brig Ann, of Boston, and her cargo, on a voyage from New Orleans to Goree (intending to stop and trade at Fayal, Madeira, and Teneriffe), by the Portuguese squadron cruising off the island of Terceia, and condemned by the tribunal sitting at Lisbon, under the authority of the Portuguese government, on the 22d of December, 1831. The agreement was made on the 27th day of January, 1832, between Hammond and Allen, by which Hammond agreed to pay Allen ten per cent. on all sums recovered until the amount should equal 8000 dollars, and on all sums, over that amount, thirty-three per cent.; and Allen agreed to use his utmost efforts to bring the claim to a favorable issue, and to receive the aforesaid commission in full compensation for his services and expenses, already incurred, or thereafter to be incurred, in prosecuting the claims.

The bill, amongst other things, alleged that on the 19th of

January, 1832, in consequence of measures taken by the representatives of the government of the United States, at Lisbon, the Portuguese government recognised and admitted the complainant's claim to the amount of 33,700 dollars, of which he alleges he was ignorant until the month of March, 1832. That the power of attorney was executed in consequence of certain representations made by Allen, that he could render important services in prosecuting the claim against the Portuguese government, without which services the claim would be lost; and that Allen proposed to Hammond to appoint him his agent; that he was then ignorant his claim had been recognised, and also that the agreement was executed while he remained ignorant of the fact.

The bill also charged, that the claim had not been liquidated or paid, in consequence of any interference or exertions of the defendant, or through any agency or influence on his part.

That both said instruments were executed without due consideration, and when the complainant was ignorant of the situation of his claim on the Portuguese government. That the contract of January 27th, 1832, "was entered into and executed without any adequate consideration or services to be by the said Crawford Allen paid or performed," under mistaken views and ignorance of the then situation of the complainant's claim; and was hard, unconscionable, and unequal, and ought, on that account, to be set aside, even if said claim had not been liquidated by the Portuguese government, at the time said contract was made and executed.

The answer gives the history of the acquaintance between the complainant and defendant; shows the measures to enforce this claim, which the defendant had taken as the agent of the complainant, prior to the execution of the power of attorney; that those measures were approved by the complainant; that the power was read to him; that three copies were executed; and that the complainant saw all the letters which the defendant had

received. It alleges that the defendant relinquished all claims for commissions and services, amounting to 268 dollars, then due him; and that the consideration to the complainant for executing said instruments, was the defendant's relinquishment of the immediate payment of the money then in his own hands, of what was then justly due to him for commissions and for services already rendered in regard to the reclamation of said vessel from the Portuguese government, and the agreement on the part of said defendant, to use his "utmost efforts to bring the aforesaid claim to a favorable issue," and to sustain all the expenses in prosecuting said claim.

The defendant expressly denies that it was any part of the understanding or agreement between him and the complainant, that the defendant was not to receive said stipulated sums in case there should be little or no trouble in obtaining said money.

On the contrary (he states) the understanding and agreement was that the defendant was to receive said sums and no more, even though his trouble and expenses should much exceed said sums, and to receive said sums also if his trouble and expenses should be but very small; and both parties fully understood that the value of the bargain to the defendant depended on these contingencies—and the defendant avers that he had no knowledge at the time of the situation of the claim, except that derived from the letters annexed to his answer, that all the information he had was made known to the complainant and was common to them both; that it was made known to the complainant in conversations and by exhibiting said letters; and he denies that the agreement, when executed, was to depend for its validity on any subsequent information, from any source whatever. "On the contrary, it was fully understood that contingencies like the one which unexpectedly happened, or others of an opposite character, might render the agreement very advantageous, or very disadvantageous to the defendant."

The cause was argued by *R. W. Greene* and *Webster* for the plaintiff and by *Dorr* and *Whipple* for defendants. The grounds assumed by the counsel will sufficiently appear in the opinion of the Court.

STORY J. This cause has been elaborately argued; but, after all, the merits lie in a very narrow compass. The brig Ann and cargo, owned by the plaintiff (who was also master), was captured by a Portuguese frigate for a supposed violation of the law of nations in April, 1830; and was finally condemned at Lisbon in April, 1831. The plaintiff after the capture went to Lisbon seeking for a restitution of the brig and cargo, and made representations to the American Chargé d'Affaires there, and procured his interposition with the Portuguese government in his favor. The defendant, Allen, residing at Providence, had been employed by the plaintiff in certain commercial agencies, and had procured insurance on the vessel and cargo for the voyage, on which she was captured; and, as soon as he received information of the capture, he made strong applications to the American government in favor of the plaintiff; and acted for him respecting the adjustment of the insurance. His conduct, after it was made known to the plaintiff was fully approved by him. After the return of the plaintiff, to the United States, and on the 22d of December, 1831, the plaintiff executed a letter of attorney to the defendant, whereby he appointed him his Attorney, "with power irrevocable," to demand and recover from the government of Portugal, or of the United States, &c. his claim and demand on account of the capture, with other usual and incidental authorities. Subsequent to this time, and on the 27th of January, 1832, after some conversations between the parties, the defendant having certain moneys in his hands belonging to the plaintiff, and having a claim thereon for antecedent services of various sorts, amounting (as he estimated them), to the sum of $268, and the plaintiff being desirous to realize the

whole of the funds, an agreement was entered into between them, which constitutes the subject of the present controversy. The agreement, after reciting, that the plaintiff had appointed the defendant his agent for recovering his claims on the Portuguese government, proceeds as follows: "I do hereby agree to pay to the said Allen ten per cent. on all sums, which he may recover, until the amount received shall equal the sum of eight thousand dollars; and upon all sums over the amount of eight thousand dollars so recovered I agree to pay him thirty-three per cent., which commission he is to retain out of any sums recovered." Then follows on the part of Allen the following agreement: "I hereby engage to use my utmost efforts to bring the aforesaid claims to a favorable issue; and that I do agree to receive the aforesaid commission in full compensation for my services and expenses already incurred or hereafter to be incurred in prosecuting the claims." Now, at the time when this agreement was made, though wholly unknown to both parties, the Portuguese government had, by a treaty stipulation dated the nineteenth day of the same month, allowed and liquidated the plaintiff's claim; so that nothing farther remained to be done in the premises. The information of the arrangement was received at Washington in April, 1832. Subsequently one instalment was received and remitted to England, where certain proceedings were had at law and in equity between the plaintiff and defendant, which terminated in an agreement to remit their respective claims to the domestic forum for a final adjudication.

The object of the bill, under these circumstances, is to set aside the agreement as unconscientious, and without consideration, and to place the parties in the position, which they respectively occupied in relation to each other, antecedently to that transaction. The parties certainly stood in a delicate relation to each other at the time of this agreement, that of principal and agent; and I need not say, with what scrupulous fidelity, closeness and vigilance, a Court of Equity watches over every transac-

tion between them, in common cases, but especially when there is skill, influence, and property on one side, and distress, ignorance, and unmeasured confidence on the other. But considerations of this sort do not require to be more than glanced at on the present occasion, since there is no allegation of fraud, or intentional imposition, or undue advantage set up in the bill.

Some suggestion has been, indeed, made in the bill, and it has been followed out in the argument, that the making of the letter of attorney in its terms irrevocable was not understood or assented to by the plaintiff. The bill asserts the ignorance of the plaintiff; the answer, responding to the bill, as expressly insists upon the plaintiff's knowledge of it. The evidence also is clearly on this point favorable to the defendant. Certainly, as this is on all sides admitted to be a case, where there was no intention of the plaintiff to convey an absolute or a mortgage interest in the property claimed to the defendant, the declaration, that the power was to be irrevocable, must be admitted to be somewhat unusual. But it may have been intended to be a security (in the nature of a lien) to the defendant for his commissions for his services; and then, in a sense, though not in the sense ordinarily given to the terms, it might be construed to be a power coupled with an interest.[1] But though irrevocable in its terms, it would certainly have been competent for the plaintiff at any time to have revoked the power, by paying all the just commissions for the services of the defendant connected therewith. At present, however, it is no otherwise important in the case, than as it shows the foresight of an intelligent agent, taking an abundant (though not an improper) care of his own interest, and an implicit confidence and devoted trust on the other side.

The real question in the case is, whether this is such a case

[1] See *Hunt* v. *Rousmaniere's* administrators, 2 Mason R. 244, 342; S. C. 8 Wheat. R. 174; *Gausson* v. *Morton*, 10 B. and Creaw. R. 729.

of mutual mistake going to the substance of the contract, as makes it void, or voidable in a court of equity. Now, the very basis of the contract certainly was, that important and valuable services were to be rendered and expenses incurred by the defendant in the future prosecution of the claim. Neither party could have contemplated, that the claim was already settled, or that nothing further was to be done to earn so enormous a compensation. The defendant himself surrenders the point. He admits, that his antecedent services on this and in all other concerns of the plaintiff could not entitle him to more than $268; and that if the actual facts had been known to the plaintiff the present agreement would not have been entered into. The basis then, and the whole basis, of the agreement was a mutual mistake of a fact, constituting the whole consideration of the agreement. Each party supposed, that the claim was unliquidated, and therefore a high compensation ought to be allowed for future services, which would be rendered at the risk and expense of the agent. His compensation for those services was contingent, and dependent upon the successful issue of the claim; and therefore was liberally, not to say profusely, provided for. The whole argument for the defendant rests on the ground, that the possibility of the claim having been already adjusted must have been taken into the account by the parties at the time of the agreement, because it ought to have been taken into the account, and the circumstances naturally led to it. I think, that there is not the slightest evidence to establish the fact, that it was actually taken into the account. On the contrary, the whole transaction manifests, on the part of the plaintiff, an utter despondency as to the future success of the claim; and the stipulation on the part of the defendant is for future efforts, and future services and future expenses in prosecuting the claim. The *casus fœderis*, if I may so say, the case contemplated by the parties did not exist.

There is no principle of law more generally admitted than

that a mistake of a fact, going to the essence of a contract, avoids it. *Non videntur, qui errant, consentire,* is the maxim of the civil law; and it is a maxim of universal justice. The only question, which can arise, is in ascertaining and distinguishing, what is an error or mistake in circumstances, which do not influence the contract, and what is an error or mistake in circumstances, which induce the contract.[1] Pothier has expounded this doctrine with great clearness and precision, and it rests on principles, about which it is difficult to frame a doubt. At least, if a doubt can be stated, it has hitherto been wholly unregarded in equity jurisprudence.[2] Thus (to put a case stated by Pothier), if one, with the intention of buying from you a pair of silver candlesticks, were to buy of you a pair of plated candlesticks, you and he both being in mutual error, supposing them to be silver; such a contract would be utterly void.[3] So if A should buy an estate of B, which each supposed to belong to B, and the title of B should turn out to be utterly void, a court of equity would, upon the ground of mutual innocent mistake, constituting the basis of the contract, rescind it.

It is wholly unnecessary to introduce farther illustrations of so clear a principle, as firmly fixed in English and American jurisprudence, as it is in the Roman code; and springing from the same general source, the law of natural justice. Now, I confess myself wholly unable to see, how the present case can be extracted from the reach of the principle. It is a case of mutual error, upon a matter of fact, constituting the very basis of the contract, and the whole consideration for it. The ingenious arguments, which have been urged, and the authorities, which have been cited on the present occasion, do not appear to me to establish any solid ground for excepting the present case from the general doctrine. The authorities steer wide of the case.

---

[1] See 1 Fonbl. Eq. b. i. ch. 2. s. 7, and note (*t*) and (*v*).

[2] Pothier on Oblig. P. 1, ch. 1, note 18. [3] Ibid.

The reasoning, if admissible to its full extent, shakes the very foundation of the general doctrine.

All the cases cited proceed upon a clear distinction. They are cases, where the parties at the time contracted upon equal terms; or where all the facts were, at the time, as the parties supposed them to be, but they were varied by subsequent events; or the parties contracted for the very matter of a contingency, that being of the essence of the contract. I agree, that mere inadequacy of price is not *per se* a ground to set aside a contract fairly entered into by the parties, and having no ingredient of fraud or of a mistake of facts. Mr. Fonblanque (1 Fonbl. in Eq. b. i. ch. 2, s. 9, note (*d*) and (*e*)), has well stated the general result of the cases; with which there is no reason to be dissatisfied. And if the consideration involves a contingency, which may happen before the agreement is completely carried into effect, but has not happened, when it is entered into, that furnishes no ground to rescind it; for the parties take the contingency upon themselves *in futuro*. But in all these cases, if there is a mutual mistake of material facts; if there is no longer any existing subject-matter of the contract; or if the contingency, though unknown to the parties, is actually determined before the parties have entered into the contract; under all these and the like circumstances, the contract fails in its very basis, and in conscience and equity is held inoperative.

The case has been put of a policy of insurance upon a ship or cargo; and it is asked, whether a recovery may not be had, even if the ship or cargo is lost at the time of executing the policy? Under our policies it is very certain, that a recovery may be had; for our policies all contain the words "lost or not lost;" the effect of which is, that the underwriter takes upon himself the very risk of a loss at the time, receiving a premium for the whole voyage. Perhaps (for I do not know, that the point has ever directly arisen in our law) the same result would arise

upon the true construction of the general words of the policy, without such a clause, as the underwriter receives a premium for the whole voyage, and undertakes the risks of the whole voyage from its commencement to its end; and, therefore, by necessary implication, if the ship is safe at the commencement, he guarantees her safety from that period. *Roccus* seems to deduce this conclusion from the nature of the contract of insurance, without any clause on the subject.[1] It may be so. But then it is upon the clear understanding, that it is a part of the risks of the contract taken by the underwriter, for which he receives a proportional premium. *Pothier* and *Emerigon* admit this to be the foundation of the special rule applied to this class of cases, and, at the same time, acknowledge the general rule in common contracts to be otherwise.[2] The same principle applies to the case of the safe arrival of the ship, unknown to both parties. In such a case, at least when the policy contains the clause of "lost or not lost," (to which case Mr. Park confines his affirmance of the doctrine[3]) the underwriters take all risks upon themselves for the whole voyage; and it is understood, that being so liable, and taking upon themselves all contingencies on account of losses, the assured concedes to them all the benefits of a safe arrival, as an implied result of the contract. But if an insurance were made upon a ship from a particular day, and she had perished before that day, though unknown to both parties, no one would suppose, that the underwriter was bound for the loss.[4] The reason is clear; the insurance was made under a mutual mistake of a fact, constituting the essence of the contract, at the time of its inception. So, if an insurance should

[1] 1 Roccus Assec. n. 51.

[2] See Pothier Traité des Assur. n. 11, n. 46. 2 Emerigon, ch. 15, s. 2, p. 154. 1 Marshall on Insur. b. i. ch. 8, s. 2, pp. 332, 333.

[3] Park on Insur. ch. 19, p. 503, 6th edit. 1809.

[4] 2 Emerigon, ch. 15, s. 2, p. 156. Roccus Assec. n. 57.

be made on goods on board a particular ship, and the premium should be paid; if the assured, acting under a mistake, had no goods on board, the premium would be recoverable back; for the policy never attached, and the insurance was made under a mutual mistake of a fact, constituting the basis of the contract. In short, the principle is (as it is stated by Mr. Park), that if the ship or property insured was never brought within the terms of the written contract, so that the insurer never run any risk, the contract is void, and the premium must be returned.[1]

The case, which trenches most closely upon the distinction, here stated, but which in fact turned upon the very distinction, is *Earl March* v. *Pigot* (5 Burr. R. 2802). I do not say, whether that case was, or was not rightly decided; for upon that point grave doubts may be entertained. But the decision there made was upon the ground, that though the actual death of the father of either of the parties was not then in contemplation of either of them, it was, as an unknown event, wholly immaterial, in the view of both, to the essence of their contract." "If, (said Lord *Mansfield*), it (the fact of such death) had been thought of, it would not have made any difference in the act; and there is no reason to presume, that they would have excepted it." That cannot be presumed in the present case; for the very basis of the contract is an existing contingency, and future services and expenses.

In *Mortimer* v. *Capper* (1 Bro. Ch. R. 156), the bargain proceeded upon no mistake of existing facts; and it was sought to be set aside upon events subsequently occurring. The case of the mine, in *Fox* v. *Mackreth* (2 Bro. Ch. R. 420), was not a case of a mutual mistake of a fact, vital, in the opinion of both parties, to the essence of the contract. The sale of the land necessarily included a sale of all below its surface; and, consequently, the vendor must necessarily have contemplated,

[1] Park on Insur. ch. 19, p. 503, 6th edit. 1809.

that it included mines as well as common soil. But suppose both parties had contracted under a mutual mistake, that there was no mine, as the basis of their contract, would the conclusion have been the same? Certainly not; any more than if they had contracted under a mutual mistake, that there was a mine, and there was none.

In the case of *The City of London* v. *Richmond* (2 Vern. R. 421), the only question was, whether a court of equity should refuse to decree a specific performance of a bargain simply, because it was a losing bargain, the rent reserved being £700, the real value not more than £300. No fraud or mistake of fact was pretended. In *Ramsbottom* v. *Parker* (6 Madd. R. 6), the question was, whether a contract by one partner, on retiring from the partnership, to pay a particular sum of money, and be discharged from all debts thereof, should be set aside, because it turned out by subsequent events, that his share of the debts would have been more than ten times as large a sum. The Court said, that there could be no such relief, where the advantage or disadvantage of the contract was to be the result of future contingencies, and was not within the view of the parties at the time. But, suppose all the partners at the time had, by mistake, understood, that the whole debts were but £5,000; and that this was the basis of their contract; and it turned out, that instead of being £5,000, they were £30,000; it is clear, that the contract must have been set aside, as founded in mutual mistake.[1]

These are the most important cases on this subject, which have been cited by the counsel for the defendant. They all fall short of the point, on which the present case hinges; and are distinguishable from it in most material circumstances. In my judgment, they leave the case of the plaintiff untouched, upon its original ground of a mutual mistake of facts, constituting the very basis of the contract.

[1] See on a similar point, 1 Domat, b. i. tit. 1, s. 4. art 21.

But it is said, that there has been a full ratification of the contract by the plaintiff, with a full knowledge of all the circumstances. It is wholly unnecessary for me to go into a minute examination of the acts relied upon to establish such a ratification. All, I need say, is, that I can perceive no sufficient grounds in any part of the evidence to establish it as a matter of fact. And, in a case of this sort, nothing but a clear and unequivocal ratification, after full deliberation, and a complete review of all the material circumstances, ought to be held satisfactory by a court of equity.

My opinion, therefore, is, that the plaintiff is entitled to have a decree, that the agreement of the 27th of January, 1832, be delivered up and cancelled, and that a perpetual injunction issue to prohibit the defendant, from asserting any title at law, or in equity, under the same. But this decree ought to be upon the terms, that the plaintiff bring into court, to be paid over to the defendant, upon his compliance with this decree, the sum of $268, with interest on the same, from the 27th day of January, 1832, which the defendant asserts to be a compensation due to him, and which is not put into contestation on the other side. I think, also, under all the circumstances, there should be no costs to either party.

Memorandum. This case was subsequently affirmed on appeal by the Supreme Court of the United States. See *Allen* v. *Hammond* (11 Peters R. 63).

CIRCUIT COURT OF THE UNITED STATES.

Fall Circuit.

MAINE, OCTOBER TERM, 1836, AT WISCASSET.

BEFORE { Hon. JOSEPH STORY, Associate Justice of the Supreme Court.
Hon. ASHUR WARE, District Judge.

CHARLES GORDON AND OTHERS

v.

LEAVITT HOBART AND POLLY HOBART.

The Act of Maine, of 5th February, 1821, ch. 39, § 1, requiring a tender, in certain cases, to be made of money due upon a mortgage, respects suits in the State Court only, and does not apply to the general equity jurisprudence of the Courts of the United States. *Quære*, as to the cases, to which this Statute is applicable.

The Equity jurisdiction of the Courts of the United States is independent of the local law of any State, and is the same in nature and extent, as the Equity jurisdiction of England, from which it is derived. Therefore, it is no objection to this jurisdiction, that there is a remedy under the local law.

The Act of Maine of 20th February, 1821, ch. 36, declares, that all deeds shall be good, as against third persons, only when "acknowledged by the grantor before a justice of the peace, in this State (Maine), or before a justice of the peace *or magistrate* in some other State, &c." *Held*, that an alderman of the city of Philadelphia, is a magistrate within the sense of the Statute, and that an acknowledgment before him will be sufficient.

Quære, if this Statute will protect mere strangers, who claim no title under the grantor, such as a disseizor, or no title in conflict with that held by the grantee, such as a mortgagee against a grantee, claiming the estate or equity of redemption by an unacknowledged or unregistered deed.

A magistrate is a person entrusted with power, as a public civil officer.

The Courts of the United States are bound to take judicial cognizance of the laws of the different States.

Quære, if the purchasers of an Equity of redemption can take the objection, that the mortgage was upon a usurious consideration, or, as plaintiffs, can have any relief in Equity, without offering to pay the amount due.

A judgment of foreclosure was recovered by the executrix of the mortgagee, in 1826, in a suit against the original mortgagor. Long before this judgment, viz., in 1819, the mortgagor had assigned all his title to redeem the premises to two other persons, under whom the plaintiffs derived their title. *Held*, that this judgment can operate as a bar or estoppel only between the particular parties to it and their privies, and is *res inter alios acta* and inoperative, as regards the plaintiffs, and that the possession under it is not subversive of their right to redeem.

The Act of Maine of 5th February, 1821, ch. 39, provides that the right of redemption of the mortgagor, and all claiming under him, may be foreclosed by the mortgagee's taking peaceable and open possession of the premises mortgaged for the condition broken, in the presence of two witnesses. *Held*, that the possession, under the writ of possession, in the presence of the sheriff delivering, and the agent receiving it, was not a possession in the presence of two witnesses, in the sense of the Statute, by which the plaintiff's rights are foreclosed.

A mortgagee will not be permitted in a Court of Equity to set up an adverse possession to bar the right to redeem of his mortgagor, or of purchasers under him, unless the possession has been for twenty years, which constitutes equitable bar from lapse of time.

THIS was a bill in equity, brought to redeem certain parcels of land, which were separately mortgaged by three different and independent mortgages, by John Gordon (under whom the plaintiffs claimed by intermediate assignments), to John Hobart, since deceased, under whom the defendants claimed title. The plaintiff in the original bill (Jesse Gordon), having died during its pendency, a bill of revivor was brought by his heirs, the present plaintiffs; and the cause came on for argument upon the bill, answers, and evidence in the cause, since the revivor.

The material facts appear in the opinion of the Court.

C. S. Daveis for the plaintiffs; *S. Longfellow*, for the defendants.

STORY J. The principal question in the case is, whether the plaintiffs have a right to redeem either or both of the mortgages, or the same have been foreclosed, so as to cut off the right of redemption. But some other points have been incidentally stated, and relied on by the defendants, to which it is proper briefly to refer.

One objection is, that the plaintiffs are not entitled to maintain their bill, because no tender has been made of the money due upon the mortgages, as is required by the Act of Maine of the 5th of February, 1821, ch. 39, § 1. To this, the true answer is, that the regulation respects suits in the State Court only under that particular statute; and is wholly inapplicable to the general equity jurisdiction of the Courts of the United States, which can, in no manner, be limited or controlled by State legislation. Whether the State statute can be applied, except to cases, where a particular and certain debt or duty is admitted to be due and unperformed, we need not inquire, though it seems difficult to conceive, how it can be applied to cases, where the debt or duty is wholly uncertain and indeterminate, and cannot be ascertained, but by the judgment of the Court, acting upon all the circumstances of the particular case.

Another objection is, that the deed of Thackara to Jesse Gordon (under which the plaintiffs claim) was acknowledged before an alderman of the city of Philadelphia; and that such an acknowledgment, though the deed has been recorded, is not good under the statute of Maine, of the 20th of February 1821, ch. 36, to pass the property. That statute declares, that "all deeds and other conveyances of lands, &c. signed and sealed by the party granting the same, having good and lawful right and title thereto, and acknowledged by such grantor or grantors before a justice of the peace in this State, or before a justice of the peace or magistrate in some other of the United States of America, &c. and recorded, &c. shall be valid to pass the same without any other act or ceremony whatsoever. And no bar-

gain, sale, mortgage, or other conveyance, &c. of any lands, &c. shall be good and effectual to hold such lands, &c. against any other person or persons, but the grantor or grantors and their heirs only, unless the deed or deeds thereof be acknowledged and recorded in manner aforesaid." So that the deed, if the acknowledgment has not been regularly made, is not utterly void, but is good to convey the land against the grantor and his heirs. The obvious policy of this enactment is to protect subsequent purchasers and claimants under the grantor, having no notice of the prior conveyance. Whether it extends to protect mere strangers, who claim no title at all under the grantor, such as a disseisor, or no title in conflict with that held by the grantee, such as a mere mortgagee against a grantee, claiming the estate or equity of redemption by an unacknowledged or unregistered deed, may perhaps be a matter of some difficulty, at least in a court of equity. But I pass by this point, for the purpose of considering, whether the acknowledgment in the present case is in conformity to the statute or not. And this resolves itself into the mere question, whether an alderman of the city of Philadelphia is a magistrate in the sense of the statute. In my judgment, he is; for I know of no other definition of the term "magistrate" than that he is a person clothed with power as a public civil officer. Mr. Justice *Blackstone*, in his Commentaries, says, that "the most universal public relation, by which men are connected together, is that of government, namely as governors or governed, or in other words, as magistrates and people."[1] And, after speaking of the king as the supreme magistrate, he proceeds to speak of subordinate magistrates, and he enumerates several classes of persons, to whom the appellation is applicable, whose rights and duties he shall not investigate; and then adds; "Nor shall I enter into any minute disquisitions with regard to the rights and dignities

[1] 1 Black. Comm. 146.

of mayors, and *aldermen*, or *other magistrates* of particular corporations; because they are mere private and strictly municipal rights, depending entirely upon the domestic constitution of their respective franchises." Thus, he plainly admits aldermen to be magistrates; and he afterwards enumerates others, whose rights and duties he shall consider; and among these are sheriffs, coroners, justices of the peace, constables, surveyors of highways and overseers of the poor.[1] So that it is clear, that the appellation is not confined to justices of the peace, and other persons *ejusdem generis*, who exercise general judicial powers; but it includes others, whose main duties are strictly executive. Dr. Johnson gives a definition of the term magistrate, not materially different from that inculcated by Blackstone; saying, that a magistrate is "a man publicly invested with authority, a governor, an executor of the laws."

But it is not necessary to rest the present case on so general a doctrine. By the laws of Pennsylvania, of which this Court, as a Court of the United States, is bound to take judicial cognizance, the aldermen of the city of Philadelphia are invested with all the powers and authorities of justices of the peace, and of justices of oyer and terminer, and gaol delivery of and for that city.[2] So that an alderman of that city is in the strictest sense a magistrate.

Another objection is, that if either or both of these mortgages have been fully paid, or the condition thereof never broken, a remedy lies at law for the plaintiffs under the local law. But this objection is utterly without any foundation in this Court; for the equity jurisdiction of this Court is wholly independent of the local laws of any State; and is the same in its nature and extent in all the States; that is, it is the same in its nature and extent, as the equity jurisdiction of England, from which ours is

[1] 1 Black. Comm. 338, 339.

[2] See Act of 11th March, 1789; Act of 4th April, 1796.

derived, and is governed by the same principles. Now, no one can doubt, that this equity jurisdiction applies to all cases of mortgages, not only to redeem the premises, upon payment of what is yet due, and unpaid, but also to compel a reconveyance of the estate, if the mortgage is virtually extinguished or paid.

Let us now proceed to the objections, which go to the very merits of the bill. And, in the first place, as to the mortgage of the 25th of November, 1814, made by John Gordon to John Hobart of three lots of land, two in Westbrook and one in Cape Elizabeth, for the payment of three thousand dollars. The original bill insisted, that this mortgage was upon an usurious consideration. But it is wholly unnecessary to consider that point, or another, which might also arise, and that is, if usurious, whether the plaintiffs, as purchasers of the equity of redemption of Gordon, could avail themselves of that objection; or whether the plaintiffs could have any relief in equity, without offering to pay the amount due;—I say, it is unnecessary to consider the one point or the other; because the plaintiffs have expressly, in the supplemental proceedings, waived all right to insist upon the usury.

In respect to this mortgage, two questions arise; first, whether it has been discharged by any actual payment of the whole sum due; secondly, whether, if not paid, there has been any foreclosure of the mortgage, which extinguishes the rights of the plaintiffs. The former point need not be now considered, as it is more proper to be brought before the Court upon a report to be made by a Master, in case the latter point is against the defendants.

It is admitted, that John Hobart, the mortgagee, took possession of all the mortgaged premises in the spring of 1820, and that the possession has ever since been in him, and those who claim under him. It is also admitted, that Polly Hobart (one of the defendants), in a suit brought against John Gordon upon mortgage, by her, as executor of John Hobart, recovered the

usual conditional judgment in the Supreme Court for Cumberland County, at the November term, 1826, for the possession of the mortgaged premises, unless the sum of $3917 50, due on the mortgage, should be paid within two months; and that the sum not being so paid in March, 1827, a writ of possession issued, upon which possession was delivered to the executrix; and that the sum of $3917 50 has never since been paid. It is clear, that this judgment, and the subsequent possession, are, by the laws of Maine, a good foreclosure of the mortgage against John Gordon. But it appears, that long before this judgment, to wit, on the 18th of September, 1819, John Gordon assigned all his title to redeem the premises to Joseph Welsh and Hezekiah Ayer, under whom the plaintiffs derive title to the same. Unless, then, this judgment can operate as an estoppel or foreclosure against all persons claiming the equity so assigned, there is no ground to make it available against the plaintiffs. Now, it seems to me very clear upon principle, that the judgment can operate as a bar or foreclosure only between the parties to that judgment, and those, who claim subsequently under them. As to all other persons, it is *res inter alios acta*. It would be a most extraordinary doctrine, that third persons, not parties to the suit, and not entitled to make themselves parties, should be bound by such a judgment, a judgment, which would compel them to pay a very large sum of money, without any opportunity or right on their part to contest the debt, or its amount. No case has been cited, which establishes any such doctrine; and it is certainly the last, which a court of equity would be inclined to adopt of its own mere motion. The judgment, then, is inoperative against the plaintiffs; and the subsequent possession under it is a possession of the mortgagee, not subversive of their right to redeem.

But, then, it is said, that the right of redemption of the mortgagor, and of all claiming under him, may, by the local laws (Act of 5th February, 1821, ch. 39), be extinguished and fore-

closed, not merely by process of law, but by the mortgagee's taking peaceable and open possession of the premises mortgaged for the condition broken in the presence of two witnesses; and that the possession, under the writ of possession, may be treated as such a possession in the presence of two witnesses, the sheriff delivering possession, and the agent of the executrix receiving it. But this would be a most strained and unnatural construction of the statute; and, indeed, wholly repugnant to its objects, as well as to its terms. The statute puts an entry by process of law in contradistinction to an entry in the presence of witnesses.

As to the other mortgages, viz. that of the 27th of November, 1815, of a certain wharf and flats in Westbrook, and that of the 24th of November, 1817, of two other lots of land in Cape Elizabeth, for the security of the payment of $1600, it is necessary to say a few words only. No foreclosure or other extinguishment of the equity of redemption of any of those parcels is attempted to be set up or maintained. They are, therefore, clearly redeemable upon the payment of any sums, which may be now due on the same. The plaintiffs contend, that nothing is due; and the defendants deny, on the other hand, any payment. These are points to be disposed of by a reference to a Master to take an account of what is due on the footing of these mortgages.

It may be proper, before closing this opinion, to notice another objection to the plaintiffs' right to redeem any of the mortgaged premises; and that is, that at the time of the deed of conveyance to Jesse Gordon, in 1832, by Thackara (which is the foundation of the plaintiffs' title), the defendants held the premises under an adverse possession, and consequently that that deed was inoperative. The only answer necessary to be made to this objection is, that the possession was that of a mortgagee; and that the latter can never be permitted, in a court of equity, to set up any adverse possession to bar the title of his mortgagor, or of purchasers under him, to redeem, unless that possession

has been for twenty years, and thus has constituted an equitable bar from lapse of time.

There must, therefore, be an interlocutory decree, referring the matter to a Master, to report, what is due upon the footing of all and each of the mortgages, making all due charges against, and all due allowances to the defendants.

ABRAHAM F. HOWE AND ANOTHER

v.

JOHN H. SHEPPARD, ADMINISTRATOR OF ABIEL WOOD.

Courts of Equity follow the law in regard to matters of set-off, unless there is some intervening natural equity going beyond the statute of set-off, as where there are mutual credits between the parties, or an existing debt on one side, which constitutes the ground of a credit on the other side.

Joint debts cannot be set off against separate debts, or separate debts against joint debts, either at law or in equity; as where there is a separate debt due from a partner, and a joint debt due to the partnership.

Quære—If in a case of mutual credits and debts *in the same right*, the insolvency of either party will create such an equity as to entitle the other party to a set-off against the debt of the insolvent party.

Semble. That a Court of Equity will not entertain a set-off of a separate debt of one partner against a joint debt to the partnership, upon the ground of the insolvency of that partner.

The mere fact, that a case is in conformity with the principles of natural equity and justice is not sufficient to bring it within the jurisdiction of a court of equity. There are many principles of natural equity and justice, which are not attempted to be enforced therein.

Where there are mutual debts, which may be set off at law or in equity, the right of set-off is extinguished by a *bonâ fide* assignment of one of the debts.

Howe & Howard recovered a joint judgment against Wood in 1821; Howe, for himself, and as attorney of Howard, on the 22d of September, 1830, assigned the judgment to the United States, and Howard, on the 30th of October, 1830, surrendered all his interest therein to Howe, and authorized

him to transfer and assign the same for his own benefit. *Held*, that there was a valid assignment of the joint judgment to the United States, and that the defendant, who was the administrator of Wood, could not set off against it a debt due by Howe alone to Wood, though Howe, ever since the debt accrued, had been insolvent.

THIS was an action of debt, brought by the United States, and for their sole benefit, in the name of Howe & Howard, on a judgment recovered by the said Howe & Howard against Abiel Wood, in January, 1821, which judgment the said Howe, acting for himself, and as attorney of the said Howard, on the 22d of September, A. D. 1830, assigned to the United States, and the said Howard, on the 30th of October, 1830, assigned all his interest therein to the said Howe, and authorized him to dispose of the same as he saw fit.

The defendant, on the death of the said Wood, having taken on himself the defence of the said suit, as administrator, was defaulted, and paid one moiety of debt and interest and costs, and was now heard as to the other moiety upon the following agreed statement of facts:

That after the recovery of the said judgment by Howe & Howard against the said Wood, viz. in January, 1826, the said Wood fully paid and satisfied a judgment recovered in October, 1817, by Joseph Hurd, Jr. against Joseph T. Wood, Abraham F. Howe, and the said Abiel Wood, amounting to the sum of $13,056 damages and costs of suit, which judgment was rendered on a bond executed by the said Joseph T. Wood, as principal, and the said Abraham F. Howe and Abiel Wood, as sureties. The said Joseph T. Wood died insolvent, leaving the said judgment wholly unsatisfied, and the said Howe has never paid the said Abiel Wood nor his said administrator any part of the said sum so paid and satisfied by the said Wood for the said Howe, and that the said Howe, from the time of the said payment to the present, has been insolvent.

And the said administrator now prays to have allowed to him

so much of the said sum paid by the said Wood for the said Howe as aforesaid, as shall be sufficient to meet and offset one moiety of the said judgment on which the present suit is brought.

And the parties agree, that if the Court shall be of opinion, that the said administrator can, in law or equity, be allowed the offset aforesaid, then judgment shall be entered for the plaintiffs for costs only. But if the said sum cannot be allowed as aforesaid, then judgment is to be rendered for plaintiffs for the moiety aforesaid, with costs.

Anderson, District Attorney, for the plaintiffs; *Sheppard, pro se.*

STORY J. The present suit is debt, brought against the defendant, as administrator of Abiel Wood; and it is founded on a joint judgment recovered by Howe & Howard against Wood, in January, 1821, for the sum of $4514 07, damage and costs of suit. Howe, for himself, and as attorney of Howard, on the 22d of September, 1830, assigned the judgment to the United States; and Howard, on the 30th of October of the same year, surrendered all his interest therein to Howe, and authorized him to grant, transfer, and assign the same for his own benefit. There is no doubt, therefore, that the assignment to the United States is sufficient to convey the interest both of Howe & Howard; and it seems admitted, though not expressly so stated in the agreement of the parties, that the assignment was made as collateral security for certain debts, due by Howe and others to the United States on judgment. The present action is, therefore in fact, brought for the sole benefit of the United States.

The defendant, as administrator of Wood, insists upon a right to set off a debt due by Howe to Wood, under the following circumstances. In October, 1817, one Joseph Hurd, Jr. recovered a judgment against one J. T. Wood, and Howe and Abiel Wood, for $13,056, and costs of suit, founded on a joint bond, executed by J. T. Wood as principal, and by Howe and

Abiel Wood as his sureties. J. T. Wood died insolvent; and in January, 1826, Abiel Wood paid the whole judgment, Howe being then and ever since insolvent. The defendant, as administrator of Abiel Wood, insists, that the moiety of the judgment so paid by Abiel Wood is a debt due to him by Howe; which is not denied. He farther insists, that he has a right to set off that debt in the present suit. If he has such a right, either at law or in equity, then the parties agree to give him the full benefit of it in the present action.

In the first place, it seems very clear, that the debt is not a good set-off at law; for it is not within any statute of set-off. A several debt cannot be set off against a joint debt; for the debts are of different natures and in different rights. This is the established doctrine, and it is founded in reasoning entirely satisfactory. It is unnecessary to refer to the authorities at large, by which it is supported; but they will be found generally referred to in the case of *Jackson* v. *Robinson* (3 Mason R. 145), and *Green* v. *Darling* (5 Mason R. 208, 213). The case of *Kinnerley* v. *Hossack* (2 Taunt. R. 170), fully recognises the general doctrine, and excepts such cases only, where there is a special agreement for the set-off.

Then, how does the debt stand as a set-off in equity? The known rule in Courts of Equity is, that they follow the law in regard to matters of set-off, unless there is some intervening natural equity going beyond the statutes of set-off, which constitutes the general basis of set-off at law. Such a natural equity does arise, where there are mutual credits between the parties; or where there is an existing debt on one side, which constitutes the ground of a credit on the other side; or where there is an express or implied understanding, that the mutual debts shall be a satisfaction or set-off *pro tanto* between the parties. I advert in this general way only to the principles of Courts of Equity on this subject. But many of the authorities will be found collected in the learned opinions of Mr. Chancellor *Kent*, in *Duncan*

v. *Lyon* (3 John. Ch. R. 358, 359), and *Dale* v. *Cooke* (4 John. Ch. R. 11, 14); and also in the Commentaries on Equity Jurisprudence, (Vol. ii. ch. 37, § 1430 to § 1438).[1]

Now, in the first place, in the present case there is no pretence to say, that the debt due to Wood from Howe, as surety, was a debt contracted upon the credit of the joint debt due to Howe & Howard. The former was clearly *in invitum*, and arose upon the payment of the judgment upon the joint bond. The debt of Wood against Howe for his contributory share of the joint judgment, was a debt created by operation of law; and arose from a compulsory payment by Wood of that judgment. The debt, on which that judgment was founded, was prior in its origin (at least as far as we can see) to that due from Wood to Howe; and, therefore, the latter could not be a credit given on account of the former. It is true, that the payment was made by Wood at a later period, viz. in 1826. But there is not the slightest proof, that the parties ever agreed to consider it a set-off to the joint debt, or that the payment was a credit in contemplation of the joint debt. So that, there is a total absence of all circumstances to raise any presumption, that this was a case of mutual credit, or of an agreement for a set-off; and, in this view, *cadit questio*.

Again. This is the case of an attempt to set off a several debt of one partner against a joint debt due to the partnership. Now, neither at law, nor in equity, can such a set-off be maintained upon that mere footing. The partnership was not liable for the separate debt of one of the partners; nor bound to contribute towards its payment. There is no equity to compel a partnership to pay the separate debts of a partner, founded upon the mere fact of that relation. On the contrary, the doctrine is just as clear in equity, as at law, that joint debts cannot be set off against separate debts, or separate debts against joint debts;

[1] See also *Cheetham* v. *Cook*, 1 McClell. & Younge R. 307.

for they accrue in different rights. The authorities to this point are abundantly clear,[1] and they are ably summed up in the cases of *Duncan* v. *Lyon*, and *Dale* v. *Cooke*, already referred to. There must be some other circumstances creating an equity, in order to justify the set-off.

But, then, it is said, that here Howe is, and was insolvent at the time of the payment of the joint judgment by Wood, and that of itself creates an equity for a set-off. Whether, in a case of mutual debts in the same right, as for example, mutual joint debts, or mutual separate debts, the insolvency of either party will entitle the other to set off his debt against the debt of the insolvent party, without any other intervening equity, is a point not necessary here to be discussed or decided. Natural equity would seem persuasively to urge such a set-off in such a case; for otherwise the insolvent party might recover his whole debt; and the other party might recover a dividend only, or indeed nothing. Yet there is great reason to doubt, even in such a case, whether the courts of equity in England ever admitted a set-off founded upon the mere fact of insolvency. In *ex parte* Prescott (1 Atk. R. 231), Lord *Hardwicke* affirmed the contrary; and said, that in cases of bankruptcy, before the statute of 5th George II., ch. 30, if there were eventual debts, the creditor could not set off the debt due to him against the debt due from him to the bankrupt, even in equity.

But, in the case of a joint debt, the same reasoning could not apply in favor of the set-off of the separate debt of one of the partners; at least not, until all the joint debts were paid, and all the equities of the other partner were satisfied. For it is a general rule, that no partner has any separate interest, except in the surplus of the partnership property after the payment of all the joint debts and other equities. If there should be such a sur-

[1] See 2 Story Comm. on Equity, ch. 37, § 1437. *Vulliamy* v. *Noble*, 3 Meriv. R. 617. *Whitaker* v. *Rush*, Ambler R. 407.

plus, then, perhaps, the same rule might be applied, as in cases of mutual separate debts. So Lord *Cowper* held in *Lord Lanesborough* v. *Jones* (1 P. Will. 325), where his Lordship said; "If A. and B. are joint traders, and J. S. owes A. and B. on their joint account £100, and A. owes the said J. S. £100 on his separate account, J. S. cannot deduct so much as A.'s proportion of the £100 comes to, out of the joint debt; for that the co-partnership debts of A. and B. are to be first paid before any of the separate debts. But, if there be a surplus beyond what will pay the partnership debts, then out of A.'s share of the surplus, J. S. may deduct the separate debt of A." Lord *Hardwicke*, in *ex parte* Edmonds (1 Atk. R. 100), appears to have been swayed by the same reasoning, as was Lord *Loughborough* in *ex parte* Quintin (3 Ves. 248). In *ex parte* Twogood (11 Ves. 517), Lord *Eldon* appears not satisfied with these latter decisions; and Sir *Wm. Grant*, in *Addis* v. *Knight* (2 Meriv. R. 116), approved Lord *Eldon's* doctrine. Mr. Chancellor *Kent* has also given the weight of his own authority on the same side, in *Dale* v. *Cooke* (4 John. Ch. R. 11, 14). The strong inclination of my mind is, that, according to the present course of decisions, Courts of Equity in England will not entertain a set-off of a separate debt of one partner against a joint debt due to the partnership, upon the mere ground of the insolvency of that partner; for it must necessarily involve a settlement of all the partnership debts, and an ascertainment of all the partnership equities, before any relief can be given. That was manifestly the opinion of Lord *Hardwicke* in *ex parte* Prescott (1 Atk. R. 231); and it seems confirmed by the opinion of the same learned Judge, in *Bishop* v. *Church* (3 Atk. R. 691), and by Lord *Eldon*, in *ex parte* Twogood (11 Ves. R. 517). I am aware, that the case of *Simson* v. *Hart* (14 John. R. 63) is apparently the other way, and affirms, that insolvency does, or may constitute a sufficient equity to entitle a party, who is a creditor upon a joint judgment, to set off that judgment against

a separate judgment debt due by him to one of the joint judgment debtors, both of the latter being insolvent. The ground of the decision seems to have been, that the party having the joint judgment, and who applied for the relief, had the sole interest in that judgment, and might urge it against either of the joint judgment debtors; and therefore might set it off against the separate debt of either, to prevent a manifest and unconscionable injury, which he might otherwise sustain. That ground would not apply in the present case; for here, Howe & Howard had a joint interest in the judgment in their favor; and Howe alone could not insist upon a right to apply it, without the consent of Howard, in discharge of his own separate debt, as the judgment was a joint security for the benefit of both partners. To bring the present case within the range of the principles in *Simson* v. *Hart*, it should appear, either that Howe was the sole owner of the joint judgment at the time, when the set-off was claimed, or that both Howe & Howard then assented to an allowance of the set-off.

The decision in *Simson* v. *Hart* (14 John. R. 63), carries with it the appearance of being in conformity to the principles of natural equity and justice. But this alone is not sufficient to bring the case within the jurisdiction of Courts of Equity for relief; since there are many principles of natural equity and justice, which are not attempted to be enforced therein. I have not been able to satisfy my own mind, that any such general principle of relief, by way of set-off, has been administered in Courts of Equity, founded upon the mere insolvency of the party, as that case supposes. On the contrary, after no inconsiderable research, I felt myself compelled to come to a very different (though not to an opposite) conclusion, in *Green* v. *Darling* (5 Mason R. 145). My subsequent researches, which have been more extensive, have not enabled me to detect any error in that opinion, or to find in English jurisprudence a single decision, which countenances any such equity for a set-off. In

the elaborate judgments of Mr. Chancellor *Kent*, where the subject has several times undergone a very full review, both of principles and authorities, there is a total silence on the same point. Still, however, I desire not to be concluded on that point, as this cause may well be disposed of, without resting at all upon that ground.

In the present case, the right of set-off could not exist against Howe and Howard, so long as the latter possessed any interest in the judgment. When that judgment was assigned to the United States, the latter were clothed with all the rights and interests of the partnership, provided the assignment made by Howe in his own name and in Howard's name, was an operative conveyance as to both; that is, provided Howe had authority from Howard, to make the assignment. That he was without such an authority, is no where asserted in the statement of facts, and is not to be presumed; and the subsequent paper executed by Howard to Howe, relinquishing all interest in this judgment, and authorizing Howe to transfer it for his own benefit, would seem to amount to strong proof of a prior authority, given by Howard, or of a subsequent ratification of the assignment by him. In either view, it would bind both Howe and Howard. And even if it were invalid as to Howard's interest, it was a good assignment of Howe's interest in the judgment, and bound him in equity to procure a relinquishment of Howard's share, which he subsequently did obtain; and so, as to Howe, in the final event, the whole judgment became vested by assignment in the United States.

Now, upon this posture of the case, it seems to me very clear, that the right of set-off on the part of Wood is gone, or rather never had any real existence. That right was not an equity, attached to the original judgment of Howe and Howard. It was a right, which at most could be asserted against Howe only, when he should become the exclusive owner in law or equity of that judgment, and while he was so owner. The assignment of that

judgment to the United States extinguished all the legal and equitable interest of Howe as well as of Howard in it; and the United States became *bonâ fide* purchasers of it, for a valuable consideration. The equity of the United States, then, is both prior in point of time, and better in point of right than that of Wood, in regard to the judgment. Where there are mutual debts, which may be set off in law or in equity, I take it to be clear, that the right of set-off is extinguished by a *bonâ fide* assignment of one of the debts. In the present case, from the statement of facts I cannot find, that there ever was a moment, in which Howe was the exclusive owner of the joint judgment; and unless he was, there never could, according to the principles already stated, exist a right in Wood to set off his separate debt against the joint judgment at law or in equity. It seems to me, therefore, that, according to the agreement of the parties, the plaintiffs are entitled to judgment.

CIRCUIT COURT OF THE UNITED STATES.

Fall Circuit.

NEW HAMPSHIRE, OCTOBER TERM, 1836, AT EXETER.

BEFORE { Hon. JOSEPH STORY, Associate Justice of the Supreme Court.
Hon. MATTHEW HARVEY, District Judge.

ISAAC D. PARSONS, IN ERROR

v.

ROBERT R. HUNTER, CONSUL, &c.

Under the Consular Act of 1803, ch. 62, § 4, the penalty of $500 for not depositing the ship's register with the consul, on arrival in a foreign port, must be sued for within two years, the limitation prescribed by the Act of 1790, ch. 36, § 31, it not being a revenue law within the meaning of the Act of 1804, ch. 40, § 3.

Semble, that an information does not lie for such penalty; but an action of debt, in the name of the consul is the proper remedy.

Semble, that any voluntary arrival in a foreign port, in the course of the voyage, although for advices only, and not the port of final destination, is within the purview of the Act.

INFORMATION for the penalty of $500 for not depositing the ship's register, &c. with the consul of the United States, on arrival in a foreign port, contrary to the Consular Act of 28th of February, 1803, ch. 62, § 4. The parties in the Court below,

the District Court of New Hampshire, agreed to the following statement of facts.

That Robert R. Hunter, Esq., is the lawful accredited American consul, resident at the port of Cowes, in the Isle of Wight, and the dependencies thereof. That the said Isle of Wight, is a foreign port. That the said Isaac D. Parsons was, on the 5th day of August, A. D. 1832, Master of a certain ship, called the Olive and Eliza. That the said ship then belonged, and was owned by citizens of the United States. That the said Parsons sailed the ship to Matanzas, in the island of Cuba, whence he took in a cargo of sugars, consigned to a certain mercantile house in the city of London, in the United Kingdom of Great Britain and Ireland. That as he was directed by his consignees at the city of London, the 7th day of August A. D. 1832, on his way from Matanzas to the city of London, touched at Cowes, in the Isle of Wight aforesaid for advices, that he neglected to deposit the register of the said ship, with the American consul at that place. That this was not, but that London was, his port of destination. That he touched at the port of Cowes merely for advices, and for no other cause. That he made no entry at the last mentioned port. That he arrived in the harbor thereof on Sunday morning, the 7th day of August aforesaid, and left the said port for London on Monday morning, the 8th day of the said August; at which last place, he arrived in safety, made a legal report and entry at the custom house of the said city of London, and deposited the register of the said ship Olive and Eliza, with Mr. Aspinwall, the American consul, at the port of London aforesaid, which said register remained with the said consul, *till* he obtained a clearance of the said ship at the said custom house, for her return to the United States aforesaid. If the Court, upon the above statement of facts, shall be of opinion, that the said Isaac has incurred the penalty mentioned in the said information, then judgment shall be rendered against the said Parsons, for the sum of five hundred dollars and costs—otherwise, the United States shall become nonsuit.

Upon these facts, the District Court gave judgment for the penalty, in favor of the United States; and upon that judgment, the present writ of error was brought by the original defendant.

The cause was argued by *C. B. Goodrich*, for the plaintiff in error, and by *Hale*, District Attorney, for the defendant in error.

Story J. The Act of 1803, ch. 62, § 4, makes it the duty of every master of a ship, belonging to citizens of the United States, "on his arrival at a foreign port, to deposit his register, sea-letter and mediterranean passport," with the consul at such port, if any there be; and in case of refusal or neglect of the master to deposit such papers, he is "to forfeit and pay five hundred dollars, to be recovered by the said consul, &c. in his own name, for the benefit of the United States, in any Court of competent jurisdiction." There is no question, but that an action of debt in the name of the consul would lie for the recovery of the penalty. But the present is an information of debt, in which the District Attorney "comes into Court and in the name of Robert P. Hunter, consul of the United States for the port of Cowes, Isle of Wight, and the dependencies thereof, who sues for the benefit of the United States, gives the Court to understand, &c." And one of the questions raised upon this writ of error is, whether an information in such a form lies in this case.

Upon the more general question presented by the facts I own, that I have felt no inconsiderable doubt and difficulty. It appears, that the ship voluntarily arrived at Cowes, having on board a cargo destined for London, and remained there for one whole day, and then departed for London. The sole object of the touching at Cowes was for advices, and no entry was made at the custom house there. The master did not deposit his register, &c. with Hunter, the American consul at Cowes; and the question is, whether under such circumstances the forfeiture has been incurred. The statute in express terms declares, that

every master of an American ship "on his arrival at a foreign port," shall deposit his papers; and if by this is meant a mere technical arrival in a foreign port, it is not denied, that the penalty has been incurred. But the argument for the plaintiff in error is, that by "arrival" the statute does not mean a mere coming within the limits of a port, but a coming into the port for the lading or unlading of goods, or for other purposes of trade, and making an entry there; and that a mere touching at a port for advices or orders, or to ascertain the state of the market, is not an "arrival" in the sense of the statute. In support of the argument the case of *Hopeful Tyler, Consul*, v. *John White*, before the District Judge of Maine at December Term 1834, has been cited; and it must be admitted, that the decision has been drawn up with great care and ability by that learned Judge, and is directly in point. It is, however, encountered, on the present occasion, by the opposing opinion of my learned brother, the District Judge of New Hampshire, who has not hesitated to declare, that whenever the master of a ship voluntarily enters a foreign port, whether it be the port of final destination or not, and anchors his ship, and there waits either a longer or a shorter time and for any purpose whatsoever, it is an arrival at a foreign port within the meaning of the statute.

That this latter opinion is in exact coincidence with the literal import of the terms of the statute will not be disputed; and the real difficulty in the case is to find in the language the just materials for a more liberal construction, suited to the common exigencies of commerce and navigation. There is no doubt, that the term "arrival" is sometimes used in our revenue and navigation laws in the common sense of coming into a port, and sometimes in the sense of coming into a port of entry or destination for particular objects connected with the voyage. No universal rule of construction, therefore, can be adopted, which is applicable to all cases; and we must be governed mainly in the interpretation of the word by the particular context, with which

it stands connected. That was the view entertained by this Court in the case of *United States* v. *Shackford in Error*, (5 Mason R. 445). But, I think, I may say, that unless there be something in the context, which deflects the word from its ordinary meaning, and shows a clear intention to use it in a more general or a more limited sense, the former ought to prevail. That the construction given to the statute by the Judge of the District Court of Maine is eminently calculated to facilitate the operations of commerce and navigation I readily admit; and the reasons urged by him are of great cogency to sustain his interpretation, that the term "arrival" means arrival at a voluntary port of destination for purposes of trade. But the difficulty is to find any such purposes either avowed or implied by the language of the statute. Cowes was a port of destination, though not of final destination. The arrival there was voluntary and intentional, and constituted a *terminus* of the voyage for the purpose of receiving or waiting for advices. Suppose the ship had remained there ten or twenty days, waiting for advices, would the case have been without the statute? If the object of the statute is to ascertain the genuineness of the character of vessels professing to be American, or that they have at all times on board the proper American papers, that policy would be equally promoted by requiring the production of the papers in all cases of a voluntary arrival. If the protection of all vessels, bearing the American flag, as such, on their arrival in foreign ports, be the object of the statute, whenever their title to protection is, or may be vouched by a public officer or consul, then it equally applies to every case of a voluntary arrival. But I do not profess to see, from the terms of the act, what is the main policy, on which this particular provision is founded. The case stands naked upon the dry terms of the section; and I feel great embarrassment in limiting those terms to an arrival in the foreign port for the purpose of trade. In the view, however, which I take of the present case, it is not absolutely necessary to decide this question.

The other question already suggested, whether this is a case, in which an information lies, is one, upon which I have far less difficulty. The statute has prescribed no form of action for the recovery of the penalty. An action of debt is the known, and usual remedy for penalties, when the suit is brought by a private person. An information of debt for a penalty doubtless lies in all cases, where the government sues for a penalty in whole or in part. But it is a prerogative remedy. I have not been able to find a single case, where, independent of some statute provision, any information for a penalty has been brought or maintained by a private person in his own name alone. In Bacon's Abridgment (A), it is said that "where by many penal statutes the prosecution upon them is by the acts themselves limited to be by bill, plaint, information or indictment, there, without doubt, the prosecution may be by information, as well as by any other of these methods. Also of common right such an information, or an action in the nature thereof, may be brought for offences against statutes, whether they be mentioned by such statutes or not, unless other methods of proceeding be particularly appointed, by which all others are impliedly excluded."[1] To language so general, general verity only can, at most, be attributed. It is clear, that in cases of penal statutes, if the whole or a part of the penalty is given to the crown, an information will lie. But there the king sues *proprio jure*, in his own name. That a private informer or other private person may sue by information "of common right" for a penalty, independent of any statute authority, requires some authority to support it. Mr. Justice *Blackstone* (4 Black. Comm. 308), says; "Informations are of two sorts, those, which are partly at the suit of the king and partly at that of a subject; and secondly, such as are only in the

[1] See also Hawkins Pl. Crown by Curwood, Ch. 26, § 2, § 17; Bac. Abridg. Actions Qui Tam. A; Com. Dig. Action upon Statute F, 1; Id. Information A, 3.

name of the king. The former are usually brought upon penal statutes, which inflict a penalty upon the conviction of the offender, one part to the use of the king, and another to the use of the informer." So that an information in the name of a private person alone seems not to have been deemed by that learned commentator to be a process known to the common law. By the Statute of 18 Elizabeth, ch. 5, § 1, it is provided "That none shall be admitted or received to pursue against any person or persons upon a penal statute, but by way of information or original action, and not otherwise;" which seems to authorize by implication the suing by information on penal statutes generally. But this is merely by force of the statute.

In the present case the suit is required to be brought exclusively in the name of the consul for the benefit of the United States. It is, therefore, to be treated as a private suit, and not as a prerogative suit. And I can perceive no ground, upon which the District Attorney is *ex officio* entitled to proceed by way of information in the name of the consul for the benefit of the United States. The consul must sue in his own name; and not under the protection of the District Attorney.

But the case need not be disposed of upon this point; for there is another objection, which in my judgment is clearly fatal. The Act of 1790, ch. 36. § 31, provides that "no person shall be prosecuted for any fine or forfeiture under any penal statute, unless the indictment or information for the same shall be found or instituted within two years from the time of committing the offence or incurring the fine or forfeiture." The Act of 1804, ch. 40, § 3, provides that "any person or persons guilty of any crime arising under the revenue laws of the United States, or incurring any fine or forfeiture by breaches of the said laws, may be prosecuted &c., provided the indictment or information be found at any time within five years after committing the offence, or incurring the fine or forfeiture." It appears to me,

that the act, on which the present information is founded, is in no just sense a revenue law; and, therefore, if the present information be maintainable at all, it can be so only, if brought within two years after the penalty was incurred. The statement of facts finds the offence was committed, if at all, between the 5th and 7th day of August, 1832. The information was not filed until the March Term of the District Court 1835; so that the two years had then fully elapsed. In suits on penal statutes, the statute of limitations need not be pleaded; but may be taken advantage of under the general issue.[1] *A fortiori*, it constitutes a good bar upon a statement of facts agreed by the parties, when the facts establish, that no suit lies from the lapse of time.

Upon this last ground the judgment must be reversed; but without costs.

I am authorized to say, that the point as to the statute of limitations was not made before the District Judge; and that the point, whether an information would lie was considered doubtful by him; and that he yielded his opinion to the suggestion, that it was the usual form of the suit in Massachusetts.

THE UNITED STATES

v.

SAMUEL CUSHMAN, ADMINISTRATOR OF JOHN ABBOTT.

Where a joint and several bond was given for duties at the custom house, and afterwards a joint judgment was obtained against all the obligors (the principal and sureties), and then, one of the obligors (a surety) died; and the survivors became insolvent; it was *Held*, that the United States were entitled to maintain a suit in equity for the recovery of the debt out of the assets of the deceased judgment debtor, whose estate was also insolvent, in virtue of their general priority in cases of insolvency.

---

[1] Buller Nisi Prius, 195.

In such a case, as between the United States and the obligors on the duty bond, all of them are deemed principal debtors.

Where sureties bind themselves jointly and severally as principals in a bond, there is no difference, as to their liability in equity for the debt, between them and the principal debtor, for whom they are sureties.

Semble, that a joint judgment is no bar at law to a separate suit against one of the obligors on a joint and several bond, or against his personal representatives. The joint judgment only bars the joint remedy in such case, and not the several remedy.

BILL in Equity, by the United States, against Samuel Cushman, administrator of John Abbott.

The parties agreed to the following statement of facts:

On 25th February, 1828, Willis Barnabee, with J. N. Sherburne and John Abbott as sureties, made their joint and several bond to the United States, in the sum of $2400, conditioned to pay certain duties on or before the 25th August, 1829, due on goods imported by the said Barnabee. On 28th August, 1829, a joint suit against the said obligors was commenced, and judgment rendered thereon on the 8th October, 1829, in favor of the United States, for $918 53 debt, and $27 06 cost. In May, 1834, the aforesaid Willis Barnabee applied for a discharge from the above-named judgment, in pursuance of certain insolvent laws of the United States—a hearing was had before the commissioners appointed under the said laws for the District of New Hampshire, and the result of this investigation was forwarded to the Secretary of the Treasury Department. After which hearing and report, the Secretary of the Treasury forwarded to the said Barnabee a letter in the following words: "Treasury Department, June 18th, 1834. Sir, your case has been decided, and the warrant for your release from your debt to the Government will be issued, and the duplicates of the same prepared and transmitted to the Attorney of the United States for your district without delay. Signed, R. B. Taney, Secretary of the Treasury."

On the same 18th of June, the Secretary of the Treasury for-

warded to the District Attorney of New Hampshire, a discharge in the following words: "To all to whom these presents shall come, I, Roger B. Taney, Secretary of the United States, send greeting; Whereas Willis Barnabee, of Portsmouth, in the district of New Hampshire, has presented his petition to the Secretary of the Treasury of the United States, to be released from certain debts due by him to the United States on the 1st day of January, 1831; and a report in writing of the circumstances of the case having been transmitted to the said Secretary by the commissioners of insolvency for said district, pursuant to the provision of the statute of the United States, passed the second day of March, 1831, entitled, 'An act for the relief of certain insolvent debtors of the United States.' And whereas I, the said Secretary of the Treasury, having maturely considered the said petition and report, and it being proved to my satisfaction, that the said Willis Barnabee was, on the first day of January, 1831, a debtor to the United States, in a sum of money which he is unable to pay; that he hath done no act fraudulently to deprive the United States of their legal priority, that he has not been guilty of any fraud, nor made any conveyance of his estate, real or personal, in trust for himself, or with an interest to defraud the United States, or whereby to expect any benefit or advantage to himself or family. Now, therefore, know ye, that I, the said Secretary of the Treasury, in consideration of the premises, and by virtue of the power and authority vested in me by the aforesaid statute, and by an act of Congress, entitled 'An act in addition to an act for the relief of certain insolvent debtors of the United States,' approved the 14th day of July, 1832, and by virtue of an act of Congress, to revive and amend the aforesaid acts, approved June 7th, 1834, do hereby decide to release the said Willis Barnabee from his said debt, upon condition that John N. Sherburne and John Abbott, the sureties of the said Willis Barnabee, shall file with the Secretary of the Treasury, their consent, in writing, that the privileges of the said acts may

be extended to him, the said Willis, without any prejudice to their liability; and provided that the right of the United States to have applied to the said debt all and every debenture certificate or certificates, applicable to the same, be not hereby relinquished, but on the contrary fully saved and reserved. Given under my hand and seal of office, at the city of Washington, this 18th of June, 1834, and of the independence of the United States the fifty-eighth. (L. S.) R. B. Taney, Secretary of the Treasury."

The said discharge now is, and ever has been retained by the said District Attorney. On 19th November, 1834, J. N. Sherburne, above-named, together with John E. Abbott, son, and sole heir of John Abbott, who deceased after the rendition of the afore-described judgment, signed a document, showing their assent to the discharge of said Barnabee; which document was filed in the Treasury Department on 10th April, 1835, and is in these words; "Whereas Willis Barnabee, as principal, John N. Sherburne and John Abbott, as sureties, all of Portsmouth, district of New Hampshire, made their certain bond to the United States of America, for the security of certain duties; upon which bond the said United States have since obtained judgment. Whereas, also, the said Willis Barnabee has proposed to avail himself of the provision of certain laws of the United States for the benefit and discharge of persons insolvent. Now, therefore, we, the said John E. Abbott, son and sole heir of the above-named John Abbott, who is now deceased, do hereby assert and approve any discharge which said United States may give to said Barnabee; also consent that the right of the United States to have applied to the said debt all and every debenture certificate or certificates applicable to the same, be not by said discharge relinquished, but on the contrary fully reserved and saved to the United States, reserving our respective rights against said Barnabee and each other as sureties."

On 26th August, 1829, Willis Barnabee surrendered to the

custom house at Portsmouth, to the collector, two debenture certificates; one for $341 40, the other for $50 66, for the benefit of the government, and endorsed on each of them a receipt for the amount thereof, which sums, amounting to $392 06, at the time of rendering the aforesaid judgment, were not and have not since been allowed to the said Barnabee. The estate of John Abbott is insolvent. Samuel Cushman is administrator of the said estate, and has assets more than the amount claimed in the bill.

Hale, District Attorney, for the United States; *Goodrich* for the defendant.

Story J. This case has been already before the Court in an action of debt, founded upon the joint judgment (referred to in the proceedings), and brought against the present defendant; and the Court were then of opinion, that, as an action founded upon the joint judgment, it was not maintainable against the defendant, as administrator of Abbott; but, that at law the judgment survived exclusively against Barnabee and Sherburne. The present bill in equity is brought to recover the amount of the same judgment out of the assets of Abbott in the hands of the defendant. The defendant admits assets sufficient to pay the amount due to the United States on the judgment; but he denies, that the United States, by reason of their legal priority, or otherwise, have any right or title whatsoever to satisfaction thereof out of the assets, under the circumstances of the present case.

There is no dispute between the parties as to the material facts. It is admitted, that the original bond for the payment of duties was in its form joint and several, and was given by Barnabee as principal, and by Sherburne and Abbott as his sureties; that the judgment was obtained against all the obligors on a joint suit in the lifetime of Abbott; that Barnabee and Sherburne are insolvent; and that the United States have received the sum of

$392 06 in debenture certificates from Barnabee, which have not been deducted from the amount of the judgment.

The first consideration, which arises, is, whether the amount of these debenture certificates ought to be deducted from the judgment debt. I have not the slightest doubt, that it ought to be deducted; for to this extent the judgment has either been satisfied, or the judgment was *pro tanto* originally taken for a larger amount than what was actually due. The argument for the United States seems to be, that it was properly matter of set-off in the original joint action; and not having been then insisted on, it cannot now be made of any avail. Now, whatever force there might be in the argument upon the ground of laches, if the present were a suit brought by any of the parties to the original judgment to be relieved against the same to the amount of the debenture certificate, upon which it is unnecessary to give any opinion, though I must say, that it would be difficult to convince a court of equity, that it ought not, under the circumstances, to give the relief, as the case of an omission of credit by mistake or accident; or, if treated as a set-off, in the nature of a counter demand, which might be, but was not necessary to be, set off in that suit; the argument can have no just application in the present case. The present suit is brought by the United States to enforce a claim against the defendant in equity; and it would be most extraordinary, if a court of equity should lend its aid to any party to recover any debt beyond what in conscience and truth is due to him. One of the fundamental rules in equity jurisprudence is, that he, who seeks equity, must do equity. The debenture certificates, in truth, are to be deemed a part payment of the debt; which the United States were bound to give credit for; and it would be a fraud upon the sureties to set up a claim against them for the whole judgment debt, when it had been in part extinguished, and the United States must be presumed to have agreed to give a credit for the same *pro tanto*.

We come, in the next place, to the consideration of the point raised by the defendant, as to the release of Barnabee by the Secretary of the Treasury. I have already had occasion to express my opinion, that the release was inoperative in consequence of the conditions annexed thereto not having been complied with; for Abbott, the surety, in his lifetime never assented to it, and the assent of John E. Abbott, his son, is in no just sense the assent of his legal "representatives," if such an assent would have been a compliance with the condition. The main argument on behalf of the defendant is, that the release became, in the event, an operative discharge of Barnabee, notwithstanding it has not been delivered, and notwithstanding the condition has not been complied with; because (it is said) the Secretary has required by the condition more than by law he was authorized to require; and also, because a literal compliance with it became impossible. The condition required is, that Sherburne and Abbott should consent to the discharge of Barnabee, without any prejudice to their liability. At the time of the making of the instrument, Abbott was dead; and, therefore, a literal compliance with its terms was impossible; and the Secretary had no right, by law, to impose the condition. Besides; by the death of Abbott, he was discharged at law from the judgment; and it survived against the other obligors only. The assent of his legal representatives could not be required to the discharge, for by his death his legal liability was gone; and they were by law incompetent to give such an assent. Sherburne, the only surety, who is liable upon the judgment, has assented; and the condition by his assent had been complied with, as far as could be required by law. Such is the argument.

The infirmity of the argument is, that it assumes, that if the condition annexed by the Secretary is either impossible, or beyond what the law requires, or authorizes, the condition is void, and it leaves the release absolute. Now, that is the very matter in controversy. And my opinion is, that the release of the

Secretary, if it is to operate at all, must operate throughout. If he has exceeded his authority, the whole act is void, and not merely the condition. The condition is a condition precedent, and if impossible to be performed, the release does not take effect. If illegal to be required, still the release being to take effect only, when it was complied with, the whole instrument, in its original concoction, was invalid.

But it does not appear to me, that the Secretary has exceeded his authority in imposing the present condition. On the contrary, it was within the scope and objects of the laws, under which he acted. The Act of the 2d of March, 1831, ch. 61, s. 4, authorized the Secretary, when he was satisfied, that the debtor was insolvent, and had committed no fraud, to "compromise with the debtor upon such terms and conditions as he may think reasonable and proper, under all the circumstances of the case." A broader discretionary authority could scarcely have been given; and it has not, in any manner, been restricted by the subsequent acts, so as to touch the present condition. The amendatory act of the 14th of July, 1832, ch. 227, extends the provisions to reach the present case; and further provides, (s. 3) that the debtor shall not be discharged "until it shall appear to the satisfaction of the Secretary of the Treasury, that the sureties of the debtor are unable to pay the said debt, and that they are entitled to the provisions of this act in like manner, as the said principal debtor shall be entitled to the same, or *unless said sureties shall file their consent, in writing, with the Secretary of the Treasury, that the privileges of this act, and the act, to which this is an amendment, may be extended to their principal without any prejudice to their liability;* or unless such discharge can and shall be given in such manner, as not to affect the legal liability of such sureties." It is apparent, that the Secretary imposed the present condition with this directory clause immediately under his view. The Act of 7th of June, 1834, ch. 45, further provides, that if any surety, or co-surety,

of the debtor, shall be dead, "the consent of the legal representative or representatives of such deceased surety or co-surety shall be received, and entitle the applicant for relief in like manner as the consent of a living surety or co-surety would do, by the provisions of the 3d section" of the Act of 1832. So, that the very case now in judgment has been expressly provided for, viz. that of a deceased surety. And there is no pretence to say, that if the legal representative of such surety might, or could, at law or in equity, be made liable for the debt, his assent to the discharge might not be required by the Secretary, as a proper and reasonable condition of granting it.

The next question is, whether the United States are entitled to maintain the present bill, under the circumstances of the case, against the defendant, as a matter of equitable jurisdiction. I am of opinion, that they are. The estate of Abbott is insolvent; and, in a case of insolvency, the United States are, by virtue of the Act of 3d of March, 1797, ch. 74, entitled to a priority of payment out of the assets of the deceased debtor. In my judgment, there is no difference, as to the right of priority, whether the debt due to the United States is a legal debt, or an equitable debt. Each is equally within the purview of the statute; and a bill in equity is the appropriate remedy to enforce this priority against the administrator.[1]

The only real remaining question is, whether the death of Abbott operated to discharge him altogether from the original debt, both at law and in equity; for if his estate is liable in equity for the debt, it is wholly immaterial, how the matter would stand at law. The argument of the defendant is, that the present is the case of a surety, and against a surety a court of equity will take no step to enlarge his liability, or to make him liable, where he is already discharged at law. Generally speak-

[1] *United State* v. *Howland*, 4 Wheaton R. 108, 115. 1 Story Comm. on Eq. § 531 to 535.

ing, this doctrine is true, and fully supported by the authorities.[1] But the question is, whether it applies to the present case. This is not a case, where the plaintiff seeks to have a bond, or other contract, joint in its form, reformed, so as to make it joint and several against a surety, living, or dead. In such a case, a Court of Equity will not interfere, unless there is the most plenary evidence to establish the fact, that it was the intention of all the parties, that it should be several, as well as joint. But if such an intention is clearly established, Courts of Equity will enforce that intention, when there has been an omission to express it by accident, or mistake, or fraud, as well against sureties as against the principal debtor. Under such circumstances there is no distinction between the case of sureties and that of principals; for it is a mere specific performance of the original contract, as understood by all the parties. The true difference between principals and sureties is, that in the case of principals, Courts of Equity will ordinarily presume, that a contract, in form joint, was intended to be joint and several, as all are equally debtors. But in the case of sureties, Courts of Equity will presume nothing beyond what the positive facts substantiate; and if the contract is in form joint, they will not presume it to have been intended to be joint and several, unless upon distinct and satisfactory proofs to that effect. The cases of *Devaynes* v. *Noble* (Sleech's case), 1 Meriv. R. 564 to 568, *Powell* v. *Sumner* (2 Meriv. R. 36), *Thomas* v. *Frazer* (3 Ves. R. 399, 402), *Rawstone* v. *Parr* (3 Russ. R. 424, 539), *Wiser* v. *Blackly* (1 Johns. Ch. R. 607), *Berg* v. *Radcliff* (6 John. Ch. R. 302), *Miller* v. *Stewart* (9 Wheat. R. 680), *Hunt* v. *Rosmaniere's Adm'rs.* (8 Wheat. R. 211, 212, S. P. & C. 1 Peters R. 16), *Weaver* v. *Shryock* (6 Serg. & R. 262, 264, 265), fully recognise the general doctrine and the distinction, each of which indeed is so reasonable in itself, that as soon as it is enunciated, it carries with it its own intrinsic justification.

[1] See 1 Story Comm. on Eq. § 164. Id. § 82.

But no reform whatever is required of the instrument in the present case. It is a bond joint and several in its form (as is required by the Duty Collection Act of 1799, ch. 128, s. 62); and therefore it is the several, as well as the joint contract of each of the obligors. As between the obligors themselves, Sherburne and Abbott were the sureties, and Barnabee the principal debtor. But as between them and the United States, they were all principal debtors, jointly and severally liable as such by the general principles of law, as well as in equity. The reasoning of Mr. Chancellor *Kent*, in *Berg* v. *Radcliff* (6 John. Ch. R. 302), is entirely satisfactory and conclusive upon this point, if it admitted, as I conceive it does not, of any reasonable doubt.

The argument of the defendant proceeds upon the supposition, that if a bond, joint and several in form, is sued against all the obligors, and a joint judgment is obtained thereon, that joint judgment, though unsatisfied, *ipso facto*, extinguishes the several, as well as the joint obligation *ex contractu*. No authority has been cited, which supports such a doctrine even at law; and it is somewhat difficult to ascertain the principles, by which it can be maintained. A joint judgment upon a joint contract without doubt operates at law as a merger of the joint contract; and having passed *in rem judicatam* no joint suit can afterwards be maintained upon the contract, but only upon the judgment. That has been the well-established law at least ever since *Higgins's case* (6 Co. Rep. 44, 45, 46); on the ground, that a judgment, being matter of record, is of a higher nature than a mere specialty; and the law will not in point of policy allow a plaintiff to multiply suits for the same cause of action against the defendant, to his oppression and injury.[1] If one of the judgment debtors dies, the judgment survives against the others; and

[1] See Comyns Dig. Action K 3, K 4; *Lechmere* v. *Fletcher*, 1 Crompt. and Meeson, 632, 633.

no remedy at law lies upon it against the executor or administrator of the deceased debtor. If, however, the original debt was in reality the joint debt of all the parties, as partners, or as otherwise having a joint interest, and the survivors are insolvent; in such a case a Court of Equity will enforce the judgment, as it would have enforced the original contract, against the assets of the deceased debtor, upon the ground, that it ought, under such circumstances, to be treated as a several, as well as a joint contract.

In the present case the contract is several, as well as joint; and it becomes necessary to consider, whether the joint judgment could even at law operate as a bar to a several suit brought against Abbott in his lifetime or against his legal representatives after his decease upon the several obligation created by the bond. Treated as a matter of principle it would be difficult to affirm, that a joint judgment ought to be held any bar except to the joint contract, on which it was founded. In a several suit bought rightfully on the bond as a several contract, the bar of a former joint judgment would not seem to apply; for in a legal sense the former judgment was not between the same parties, nor upon the same contract. It would be strictly *res inter alios acta*.

In *Higgins's case* (6 Co. Rep. 44, 45, 46), it was held by the Court, that where two are bound jointly and severally and the obligee has judgment against one of them, he may yet sue the other; for against him the nature of the bond is not changed; for notwithstanding the judgment he may plead, that it is not his deed.[1] That case is not directly in point to the present; for, here, the original judgment was joint; and therefore, *quoad* the bond, as a joint contract, it had as to both passed *in rem judicatam*. In *Dyke* v. *Mercer* (2 Show. R. 393), two men were

[1] See *Broome* v. *Wooton*, Yelv. R. 67, (and Mr. Metcalf's note); S. C. Cro. Jac. 73, 74; S. P. stated in 1 Crompton and Meeson R. 634, 635.

bound in a bond to J. S. (it is not said jointly and severally); one was sued, who pleaded, that his co-obligor had been sued to judgment and thereupon a *fieri facias* issued, and the sheriff levied the money. Upon demurrer it was held, that the plea was bad, it not averring any satisfaction. Here, again, the party sued was not a party to the former judgment. In *Sheehy* v. *Mandeville*, (6 Cranch R. 253, 265), it was held by the Supreme Court of the United States that a recovery in a several suit against one partner upon a partnership contract (a note) was no bar to a joint suit against both partners on the same contract, at least as to the partner, not before sued, and who set it up as a separate defence; for as to him the former judgment was no merger of the contract, he not being a party to that judgment. On that occasion the Court said; "The doctrine of merger, even admitting, that a judgment against one of several joint obligors would terminate the whole obligation, so that a distinct action could not be maintained against the others, which is not admitted, can be applied only to a case, in which the original declaration was on a joint covenant, not to a case, in which the declaration on the first suit was on a sole contract." This case also is distinguishable from the case at bar, because the defendant was not a party to the original judgment. But the remark of the Court, that a judgment on a sole contract cannot be a bar to a suit on a joint contract seems to apply in principle here; for it must be equally true as to the converse case of a judgment on a joint contract, as a bar to a subsequent suit on a sole contract. They are not, and cannot be treated as the same identical cause of action between the same parties.

The case of *Ward* v. *Johnson* (13 Mass. R. 148), is also distinguishable. The original suit was brought against one partner upon a partnership contract; and afterwards a joint suit against both partners, in which each partner pleaded the former judgment in bar. The Court held, that the former judgment was a good bar as to the partner, who was formerly sued; and

that, therefore, the joint suit was not maintainable against either partner, since there was no principle of law, which could authorize separate judgments in an action on a joint contract. The Court criticised the case of *Sheehy* v. *Mandeville*; but did not deem it applicable to the case before them. But the learned Judge, who delivered the opinion of the Court, said; "It is true, that in case of a joint and several contract an unsatisfied judgment against one of the promisors is no bar to a subsequent action against the other."

The subject has been very recently discussed in England in *Lechmere* v. *Fletcher* (1 Crompt. and Meeson R. 623); but there, again, the facts did not call for any decision of the precise point now before this Court. In that case there was an original partnership debt, upon which a joint suit was brought; and in that suit (irregularly enough, as was admitted) one of the defendants had a verdict in his favor and the other a verdict and judgment against him. Afterwards the plaintiff brought a sole suit against the defendant, who had the verdict in his favor, upon a distinct promise made to him before the former suit was brought to pay his (the defendant's) proportion of the debt. One question was, whether the former judgment in his favor was a bar to the new suit; and the Court of Exchequer held, that it was not; for it was not for the same cause of action, or to be disposed of by the same evidence. On that occasion, however, Mr. Baron *Bayley*, in delivering the opinion of the Court, went largely into the authorities, and especially commented on the case of *Higgins* (6 Co. R. 45) and *Broome* v. *Wooton* (Cro. Jac. 73; S. C. Yelv. 68). After quoting the language of Lord Chief Justice *Popham* in the latter case, that in debt on an obligation against two, "every of them is chargeable and liable to the entire debt; and therefore a recovery against one is no bar as to the other until satisfaction," he added: "If, indeed, that were the case of a joint bond, not a joint and several bond, we have been referred to no authority, which goes that length. It

may be, where you sue and recover a judgment against one debtor only, on a contract which is joint, *and not several*, that your right to sue on the joint contract is destroyed. *That, if so, would be so merely on the ground of the difficulty, to which the form of action would give rise.* If on a joint contract you have sued one, and entered judgment against him, there might be an invincible obstacle; because upon a new action against another of the parties to the contract, the defendant would have a right to plead, that he made no promise, except with the other defendant, and he could not be joined. Therefore, though we have met with no case, which establishes the position, we are inclined to think, that, in the case of a joint bond, a judgment against one joint contractor would be a bar to an action against another. But if a defendant is liable separately, as well as jointly, the technical difficulty, to which I have referred, is removed." He afterwards added; "Where there is a joint obligation, and a separate one also, you do not, by recovering judgment against one, preclude yourself from suing the other." Now, this reasoning though not *ad idem*, yet certainly in its general scope goes far to establish the conclusion, that a separate suit would be maintainable at law against Abbott's administrator, on the separate obligation of Abbott; and that the judgment on the joint action would be no bar, because in such separate suit it would not be necessary to make the other obligors parties. And upon principle, if there were no authority, it appears to me, that the same conclusion must be drawn. When a party enters into a joint and several obligation, he in effect agrees, that he will be liable to a joint action, and to a several action for the debt; and if so, then a joint judgment can be no bar to a several suit, if that judgment remains unsatisfied. The defect of the opposing argument is, that it supposes, that the obligee has an election only of the one remedy, or of the other; and that by electing a joint suit, he waives his right to maintain a several suit. That I take not to be a sound legal interpretation of the contract. The

remedies are concurrent. And I know of no principle of law, which would have prevented the plaintiffs from bringing a joint suit and a several suit on the bond at the same time, and proceeding therein *pari passu*. It is true, that they could have but one satisfaction. But we all know, that on the same contract the plaintiff may often maintain different suits at the same time, though he can have but one satisfaction. A joint judgment is not *per se* a satisfaction of a joint and several contract.

I have thought it proper to say thus much upon the general question at law. But in my judgment, it is wholly immaterial in this case, whether a suit could be maintained at law, or not. The joint contracts of debtors, having a common interest, are in equity treated as joint and several, wherever the joint remedy at law fails to enable the plaintiff to obtain satisfaction. Thus, if a joint debt of partners exists, and one of them dies, and the other is insolvent, a Court of Equity will compel payment out of the assets of the deceased partner. In such a case, a Court of Equity raises, by implication the several liability. *A fortiori*, the same principle will be applied by a Court of Equity in the case of a contract, in form joint and several, where the survivors are insolvent. If the joint judgment could be treated at law (as I think it cannot be), as a merger of the several obligation; so far from that constituting a ground in equity to refuse relief against the assets of the deceased party, it furnishes a clear ground for its interference; for it is against conscience, that a party, who has severally agreed to pay the whole debt, should, by the mere accident of his own death, deprive the creditor of all remedy against his assets. So Courts of Equity have always treated this matter; and the present case is but a new application of a very old and well-established doctrine. I do not go over the authorities. The principle to be deduced from them, and the authorities, by which it is supported, are sufficiently stated in the work cited at the argument, (1 Story Comm. on Equity Jurisp. § 676, and note (1); Id. § 164, and notes).

Sir Wm. *Grant*, in *Devaynes* v. *Noble*, Sleech's case (1 Meriv. R. 564, 565), and in *Sumner* v. *Powell* (2 Meriv. R. 30, 36), has given a very clear exposition of the doctrine, and of the grounds of equitable interference. It is applied to all cases, where the contract is in fact, or ought in contemplation of law to be held, joint and several; and then it is immaterial, whether all are principals, or a part are sureties. *Rawstone* v. *Parr* (3 Russ. R. 424; S. C. id. 539), fully recognises this doctrine, though the case was finally disposed of upon another ground, viz. that there was no sufficient proof, that a joint and general contract was intended by the parties.

Upon the whole, my opinion is, that the United States are entitled to a decree for the amount of the debt now due to the bond, after deducting therefrom, the amount of the debenture certificates, with interest upon the balance, to be paid out of the assets of Abbott now in the hands of the defendant, in virtue of their general right of priority of payment in a case of insolvency.

CIRCUIT COURT OF THE UNITED STATES.

Fall Circuit.

MASSACHUSETTS, OCTOBER TERM, 1836, AT BOSTON.

BEFORE { Hon. JOSEPH STORY, Associate Justice of the Supreme Court.
Hon. JOHN DAVIS, District Judge.

CHARLES BROWN AND OTHERS, RESPONDENTS AND APPELLANTS, *v.* REBECCA LULL, LIBELLANT.

The capture of a neutral ship does not, of itself, operate as a dissolution of the contract for mariner's wages; but at most only as a suspension of the contract.

If the ship is restored, and performs her voyage, the contract is revived, and the mariner becomes entitled to his full wages for the whole voyage, if he has remained on board, and done his duty; or if, being taken out, he has been unable, without any fault of his own, to rejoin the ship.

On a sentence of condemnation against the ship, the contract is dissolved, and the mariner is discharged from any further duty on board, and also loses his wages, unless there is a subsequent restitution of the property, or of its equivalent value, with an allowance of freight.

In the case of a restitution in value, the proceeds represent the ship and freight, and are a substitute therefor, and subject to their liens.

If freight is decreed for the whole voyage, the mariner is entitled to full wages; if, for only a part of the voyage, the mariner is entitled only to *pro ratâ* freight, unless under special circumstances, as where the mariner remained by the ship, at the special request of the master, to preserve and protect the property for the benefit of all concerned.

It is the right and duty of the mariners of a neutral ship, after capture, to remain by the ship, while there is any hope of recovering the property; and this is generally gone when there is a sentence of condemnation, and *à fortiori* when there is a sale thereof pending the proceedings, or under the sentence of condemnation.

Seamen are peculiar favorites of Admiralty, and contracts between them and ship-owners are scanned with great closeness and jealousy.

Courts of Admiralty, so far as their powers extend, act as Courts of Equity.

Any stipulations in shipping articles, which derogate from the general rights and privileges of seamen, will be held void in Admiralty, unless it shall appear, both that the nature and operation of the stipulation were fully explained to the seamen, and that an additional compensation was allowed entirely adequate to the new restrictions imposed thereby. And the *onus probandi* is on the ship-owner to establish these facts.

The following clause in the shipping articles was held void; viz. "in case of the said vessel being taken or lost in the course of the said voyage, no wages shall be demanded or received by the subscriber, except the advance wages received by them respectively, at the time of entry on board; and that, if the said vessel should be restrained for more than thirty days at any one time, the wages should cease during such restraint and no longer."

Commissioners, upon whom the law has imposed the duty of awarding a full indemnity for certain losses, cannot be presumed to have departed from it; therefore, the compensation allowed to the owner will be presumed to be a full indemnity for his loss.

The lien for seamen's wages attaches to the ship and freight, and their proceeds, into whosoever hands they may come, and takes priority of all other claims. Therefore, the ship-owners are liable, though they have received certain instalments only of the sums awarded under the treaty, and not full payment; and though a proportion of this has been paid to the underwriters, who had insured the vessel at the time of her loss.

Lull shipped, as mariner, on board of the brig Two Betseys, on 4th September, 1809, on a voyage from Beverly to Naples, and back again, at the rate of wages of $18 per month. The brig arrived at Naples in November, 1809, and while lying there, was seized, and finally, on 12th of March, 1810, confiscated and sold. Lull continued on board of the brig until 10th of June, 1810, when he was discharged by the master, with his own consent, and sailed in another vessel for Salem, where he arrived 19th of August, 1810. By a convention with the King of the Two Sicilies, a provision was made for the indemnity of this, and other American claims; and three instalments were received, amounting in all to more than the present claim for wages; a proportion of the indemnity went to the underwriters, who, at the time of the loss, had insured the said vessel. *Held*,

that the libellant, the administrator of Lull, was entitled to recover full wages from the time of Lull's shipment to the time, when he arrived in the United States.

THIS was the case of a libel *in personam* for seaman's wages, brought by Rebecca Lull, administratrix of Jonathan Lull, deceased, against Charles Brown and others (the respondents and appellants), as executors of the last will and testament of Israel Thorndike. The District Court made a decree in favor of the libellants, for the sum of $189, being the wages due to Lull from the time of his shipment in the brig Two Betseys (of which Mr. Thorndike was owner) to the time of his arrival in Salem by cartel from Naples, deducting his one month's advance wages. The present appeal was from that decree on behalf of the respondents.

The material facts were as follow. Lull shipped as a mariner on board of the brig Two Betseys (Gardner, master), on the 4th of September, 1809, on a voyage from the port of Beverly, in this district, to Naples, in the kingdom of the Two Sicilies, and back again to Beverly, at the rate of wages of $18 per month. The brig duly arrived at Naples sometime in the month of November, 1809, and while lying there was seized and sequestered, together with her cargo, and finally, on the 12th of March, 1810, confiscated and sold by a decree of Joachim Napoleon, then King of the Two Sicilies. Lull continued to remain on board of the brig, doing duty, until the time of the confiscation (the libellant asserts until the 10th of June, 1810), when he was discharged by the master of the brig, with his own consent, and he sailed in another vessel (a cartel) for the port of Salem, in this district, and arrived there on the 19th of August, 1810. By a convention made between the United States and the King of the Two Sicilies, at Naples, on the 14th of October, 1832, provision was made for the indemnity of American citizens (and among others, of the testator), whose property had been sequestered and confiscated in the manner aforesaid. The commis-

sioners under that treaty awarded $4,000 to the testator for the said brig, and $5,640 for freight, as an indemnity for his losses sustained in the premises; three instalments of which were since duly received by the respondents.

In the original shipping articles (which in other respects were in the common form), there was a clause, that in case of the said vessel being taken or lost, in the course of the said voyage, no wages should be demanded or received by the persons subscribing the same, except the advance wages received by them respectively, at the time of entry on board; and that if the said vessel should be restrained for more than thirty days at any one time, the wages should cease during such restraint, and no longer. It did not appear, that this particular clause was explained to the seamen, or that they received, on that account, any extra wages.

The testator (Mr. Thorndike) had, by sundry policies of insurance, insured the said vessel and her freight for the voyage; and under these policies he received from the underwriters the sum of $2,000, which was accordingly deducted from the amount of the sums awarded by the commissioners to the testator, for the ship and freight (viz. $1,000 from each), and was paid over to the underwriters.

The following reasons of appeal were assigned by the respondent:

1. Because the Judge allowed no effect to the stipulation in the shipping articles.

2. Because the Judge allowed wages after December 28, 1809, the day of final condemnation.

3. Because the Judge allowed wages for a period long after Lull had ceased to be employed in the vessel, and after all hope of restoration or recovery had expired, and until Lull's arrival in the United States.

4. Because no deduction was made of such proportion, as the Commissioners refused to allow for the value of the said

vessel and freight, on account of sums received by the said Israel Thorndike from underwriters.

5. Because full payment was decreed, notwithstanding the respondents have not received, and may never receive, more than two thirds of the amount awarded by commissioners.

These grounds were argued by *Franklin Dexter* for the respondents and appellants, and *J. Hardy Prince* and *John Pickering* for the libellants; and were fully considered in the opinion of the Court.

Story J. Some principles, applicable to the present case, are now so clear, that they need only be stated, although at a former time they were subject to many learned doubts. The capture of a neutral ship does not of itself operate as a dissolution of the contract for mariners' wages, but at most, only as a suspension of the contract. If the ship is restored, and performs her voyage, the contract is revived, and the mariner becomes entitled to his wages; that is, to his full wages for the whole voyage, if he has remained on board and done his duty, or if, being taken out, he has been unable, without any fault of his own, to rejoin the ship. If the ship is condemned by a sentence of condemnation, then the contract is dissolved, and the seamen are discharged from any farther duty on board; and they lose their wages, unless there is a subsequent restitution of the property, or of its equivalent value, upon an appeal, or by treaty, with an allowance of freight, in which event their claim for wages revives. In the case of a restitution in value, the proceeds represent the ship and freight, and are a substitute therefor. If freight is decreed or allowed for the whole voyage, then the mariners are entitled to the full wages for the whole voyage; for the decree for freight, in such a case, includes an allowance of the full wages, and consequently, creates a trust or lien to that extent thereon, for the benefit of the mariners. If the freight decreed or allowed is for a part of the voyage only,

the seamen are ordinarily entitled only to wages up to the time, for which the freight is given, unless under special circumstances; as where they have remained by the ship, at the special request of the master, to preserve and protect the property for the benefit of all concerned. These are principles now firmly established in our maritime law; and, indeed, they have scarcely been questioned at the argument. They will be found generally recognised in the learned Commentaries of Mr. Chancellor *Kent* (3 vol. Lect. 46, pp. 191, 192), and discussed at large in the case of the *Saratoga* (2 Gallis. R. 164); in *Willard* v. *Dorr* (3 Mason R. 91, 161); in *Sheppard* v. *Taylor* (5 Peters R. 675); in *Spafford* v. *Dodge* (14 Mass. R. 66); in *Beale* v. *Thompson* (4 East R. 546); and in Abbott on Shipping, (p. iv. ch. 3, s. 2, p. 458 to 464, and notes).

In the next place, it is ordinarily the right, as well as the duty, of mariners, belonging to a neutral ship, after capture, to remain by the ship, while there is any hope of recovery of the property; and this, generally, although not universally, may be said to be gone, when there is a sentence of condemnation; and *à fortiori*, when there is a sale therof pending the proceedings, or under the sentence of condemnation. For this doctrine, also, I may refer to the authorities already cited, and especially to the case of the *Saratoga* (2 Gallis. R. 164), where many of them are collected and commented on.

Now, upon these principles, there cannot be any doubt, that the libellant's intestate, Lull, was entitled, in the events, which have occurred, to wages from the time of his shipment up to the time of the final confiscation of the brig and cargo on the 12th of March, 1810. And here, ordinarily, his wages would stop, unless freight upon the award of indemnity has been allowed by the commissioners for the whole voyage, in which event he would be entitled to wages up to the time of his return to the United States, viz. to the 19th of August, 1810; for such an allowance of freight would include the wages of the master and crew up to that

period; and the wages would attach, by way of trust or lien, to that fund.

Then, as to the effect of the stipulation in the shipping articles, which is relied on as controlling the general right of the libellant's intestate to wages. It is well known, that the shipping articles, in their common form, are in perfect coincidence with the general principles of the maritime law as to seamen's wages. It is equally well known, that Courts of Admiralty are in the habit of watching with scrupulous jealousy every deviation from these principles in the articles, as injurious to the rights of seamen, and founded in an unconscionable inequality of benefits between the parties. Seamen are a class of persons remarkable for their rashness, thoughtlessness and improvidence. They are generally necessitous, ignorant of the nature and extent of their own rights and privileges, and for the most part incapable of duly appreciating their value. They combine, in a singular manner, the apparent anomalies of gallantry, extravagance, profusion in expenditure, indifference to the future, credulity, which is easily won, and confidence, which is readily surprised. Hence it is, that bargains between them and ship-owners, the latter being persons of great intelligence and shrewdness in business, are deemed open to much observation and scrutiny; for they involve great inequality of knowledge, of forecast, of power, and of condition. Courts of Admiralty on this account are accustomed to consider seamen as peculiarly entitled to their protection; so that they have been, by a somewhat bold figure, often said to be favorites of Courts of Admiralty. In a just sense they are so, so far as the maintenance of their rights, and the protection of their interests against the effects of the superior skill and shrewdness of masters and owners of ships are concerned. Courts of Admiralty are not, by their constitution and jurisdiction, confined to the mere dry and positive rules of the common law. But they act upon the enlarged and liberal jurisprudence of Courts of Equity; and, in short, so far as their powers extend,

they act as Courts of Equity. Whenever, therefore, any stipulation is found in the shipping articles, which derogates from the general rights and privileges of seamen, Courts of Admiralty hold it void, as founded upon imposition or an undue advantage taken of their necessities and ignorance, and improvidence, unless two things concur; first, that the nature and operation of the clause is fully and fairly explained to the seamen; and secondly, that an additional compensation is allowed, entirely adequate to the new restrictions and risks imposed upon them thereby. This doctrine was fully expounded by Lord *Stowell*, in his admirable judgment in the case of the *Juliana* (2 Dods. R. 504); and it was much considered by this Court in the case of *Harden* v. *Gordon* (2 Mason R. 541, 556, 557); and it has received the high sanction of Mr. Chancellor *Kent*, in his Commentaries (Vol. iii. § 40, p. 193). I know not, indeed, that this doctrine has ever been broken in upon in Courts of Admiralty, or in Courts of Equity. The latter courts are accustomed to apply it to classes of cases far more extensive in their reach and operation; to cases of young heirs selling their expectancies; to cases of reversioners and remainder-men dealing with their estates; and to cases of wards dealing with their guardians; and above all, to cases of seamen dealing with their prize money and other interests.[1] If courts of law have felt themselves bound down to a more limited exercise of jurisdiction, as it seems from the cases of *Appleby* v. *Dodd* (8 East R. 300), and *Jesse* v. *Roy* (1 Cromp. Jerv. & Rosc. R. 316, 329, 339) that they are, it is not, that they are insensible of the justice and importance of these considerations, but because they are restrained from applying them by the more strict rules of the jurisprudence of the common law, which they are called upon to administer.

Tried by the tests above stated, the stipulation in the present articles must be held void; for the *onus probandi* is on the ship-

[1] See 1 Story's Comm. on Equity, § 331 to § 340, and the authorities there cited.

owner to establish both the knowledge of the seamen of the nature and extent of the operation of the clause; and that a full and adequate compensation therefor was allowed to the seamen. Neither of these facts appears; and the presumption, therefore, is, that neither of them had any actual existence. If it were necessary to discriminate between the two clauses, I should be disposed to construe the first *in mitiori sensu*, as limited to a final loss of the ship, without restitution or salvage, by capture or other calamity, in the course of the voyage, and not to a mere taking or other loss not followed by such a total destruction of the voyage. But it is unnecessary here to sift its exact purport, because, upon the general considerations already stated, the entire clause may be at once laid out of the case.

The next objection, which has been rather glanced at than pressed upon the appeal, is, that the commissioners did not allow by their award the full compensation claimed by the owner. But it must be taken, that the compensation was a full indemnity for his loss; for such was the duty imposed by law upon the commissioners; and they cannot be presumed to have departed from it. That a larger claim was made, is no proof, that a full indemnity was not allowed. Merchants are not understood to be in the habit of confining claims of this sort to the very minimum of their supposed losses. They are more apt to err, if at all, upon the side of studied exaggeration.

The real objection, however, which has been raised under this head, is, that the owner has not had awarded to him the full value of the ship and freight; but, that the underwriters upon certain policies of insurance have had awarded to them the sum of $2000 (being the amount, which they paid to the owner under their policies), and that therefore the underwriters, and not the owner, are liable *pro ratâ* for such a proportion of the wages, as the sums awarded to them bear to the whole value of the ship and freight. Now, the decisive answer to this objection is, that the seamen have nothing to do with these policies of insurance, or with any rights of the underwriters derived under

them. They are strictly *res inter alios acta*. The right of the underwriters is not an adverse interest; but derivative under the testator by his own voluntary act of cession or assignment, resulting by operation of law from his having received full compensation under the policies. Suppose the testator had assigned his whole interest in the ship and freight, instead of a partial interest, for a valuable consideration; could it be for a moment admitted, that he could thereby change his own responsibility to the seamen, or turn them over for their compensation to mere strangers? Certainly not. It is quite a different question, whether they might not proceed upon their implied trust or lien against the proceeds, in whosesoever hands they could find them. But the ship-owner, by his own voluntary act of cession, cannot discharge himself from his original liability under his contract; for the value of the ship and freight, to whomsoever paid, must be deemed a payment by his consent and for his benefit. The same question was made in the case of *Brooks* v. *Dorr* (2 Mass. R. 39), and was there disposed of upon reasoning and principles entirely satisfactory.

The next and last objection, which has been made, is, that the respondents have received certain instalments only of the sums awarded under the treaty, and not full payment. It is admitted, that they have received far more than is sufficient to pay all the wages of the seamen, and that is sufficient to dispose of this objection. The wages of seamen attach as a lien to the ship and freight, and their proceeds, into whosesoever hands they may come, as a claim or privilege, having a priority to be satisfied before all other claims. As it has been sometimes expressively said, they are nailed to the last plank of the ship. The ship is a pledge for the payment, while a single fragment remains of the wreck or of its proceeds.[1]

[1] See 1 Peters Adm. R. 186, note. The *Neptune*, 1 Hagg. Adm. R. 227. The *Sydney Cove*, 2 Dods. R. 13. The *Two Catharines*, 2 Mason R. 319.

Upon the whole, my opinion is, that the libellant is entitled to maintain her suit, and to recover wages from the time of shipment (4th September, 1809) to the time, when Lull arrived in the United States (the 19th of August, 1810), that is to say, for eleven and a half months, deducting therefrom one month's advance, to wit, $207, deducting $18, which leaves a balance in her favor of $189; which is the very sum decreed by the District Court. That decree is therefore affirmed with costs.

JOSEPH GASS, IN EQUITY *v.* ABNER P. STINSON.

The defendant Stinson, being Warden of the State Prison of New Hampshire, appointed James as his agent for the sale of granite for the said prison, with power to sell the granite, and collect the moneys arising from the sales. Gass was the surety of James, for the faithful performance of the agency. *Held*, that a change in the relation between Stinson and James from that of mere agency in the sale of granite to third persons, to that of a conditional purchase, or sale and return, would amount to a discharge of the surety, Gass, *pro tanto*, or rather that the transaction would fall without the condition of the bond.

It was agreed between Stinson, the obligee in the bond, and Gass, a surety, that if Gass should be dissatisfied with continuing his suretyship in the premises, he should "have a right on ten days notice being given to the Warden of the prison *in writing*, to discontinue his liability as surety, *provided* the accounts of the agent are then all settled up, the balance paid, and the property of the State Prison delivered over to the Warden or his agent." *Held*, that this proviso in this agreement was not a condition precedent to the right of Gass to liberate himself from future suretyship, and that Gass, on giving ten days notice was entitled to be discharged from his liability for the future conduct of James, continuing, however, liable for the balance then due to Stinson, and for the delivery over of the other property then in his hands.

Held, that Gass was discharged from all liability on account of the transactions subsequent to notice of his wish to discontinue his suretyship, and that the necessity of notice *in writing* according to the foregoing agreement was waived, under the circumstances of the present case.

Held, that James was a competent witness for Gass under a bill in Equity, brought by the latter to be relieved of his suretyship.

A new bond was executed, and sent to the obligee, to take up and supply the

place of the old bond. *Held*, that it was the duty of the obligee to return the new bond forthwith, and to give notice thereof to the parties interested, and that omission to do so, under the circumstances of the present case, afforded a presumption, that it was accepted.

Semble, that at law the obligation of a surety, on a bond for the fidelity of a party for an indefinite period, cannot be determined at the will of the surety by notice. *Quære*, if the same rule prevails in Equity.

Matters may be inquired into under a bill in Equity, notwithstanding they are open at law, where the bill is brought for other purposes, as for a discovery, an injunction to stay proceedings at law, and for other general relief upon the merits, which a Court of law is incompetent to administer.

BILL in Equity brought by Joseph Gass to be relieved from a bond given by him as surety for one Noah James, to the defendant, Abner P. Stinson; and for an injunction to stay proceedings in a suit at law, brought on the bond against James and the plaintiff.

The defendant Stinson, being the warden of the State Prison of New Hampshire, on the 22d of January, 1831, appointed one Noah James, of Boston (Mass.) his agent for the sale of granite for the said prison, with power to sell the granite, and collect the moneys arising from the sales, and to sell at such prices, as should from time to time be given to him, with a power reserved to discontinue the agency at the pleasure of the warden or his successor in office. On the 27th of January, 1831, James, together with the plaintiff, Gass, as his surety, executed a bond to the defendant, in his official capacity, payable to him and his successor in office, in the penal sum of ten thousand dollars, with a condition that James, so appointed agent, should well and truly account to the defendant or his successors, for all stone or granite belonging to the said State Prison, which should come to his possession or be consigned to him, and should promptly pay over the proceeds of all sales by him made, and should, from time to time, exhibit a statement of his doings as agent, and all accounts of sales when called for by the defendant or his successor; and upon the discontinuance of his agency, that he should deliver to the defendant or his successor, free of expense and in

good order, any granite in his hands, belonging to the prison. The bond was executed in Boston, through the instrumentality of one Thompson (the deputy warden under the defendant), and he, Thompson, afterwards on the same day, signed a written instrument, by which it was agreed, that if Gass should be dissatisfied with continuing his suretyship in the premises, he should "have a right, on ten days notice being given to the warden of the prison *in writing*, to discontinue his liability as surety; provided the accounts of the agent are then all settled up, the balance paid, and the property of the State Prison delivered over to the warden or his agent."

The agency of James was revoked on the 4th of October, 1833; and about this time, James became insolvent. Stinson was removed from his office as warden, in September, 1834. Suit was brought in the Circuit Court of Massachusetts, at the May Term, 1834, against James and Gass, on the original bond. By consent, a verdict on the issues joined between the parties, was entered for the plaintiff (Stinson), which was to be altered or amended according to the report of Simon Greenleaf, Esq. an auditor appointed for the purpose; and the opinion of the Court thereon. At the May Term of the Court, 1836, the auditor made his report, stating the facts on which it was founded, finding that there was a balance due by James to the warden at the termination of the agency of $6,033 39. But the report expressly reserved, for the opinion of the Court, the question of Gass's liability as surety. No exceptions were filed to the report; and the same still stands open for the final action of the Court; Gass preferring the course of filing a bill in equity.

The cause came on for a hearing at this term, upon the bill, answer and evidence, and was argued by *B. Rand* for the plaintiff, and by *W. C. Aylwin* for the defendant. Their arguments were chiefly occupied by a discussion of the evidence. The important facts in the case, which are not given above, and also

the grounds taken by the counsel, will be found in the opinion of the Court.

Story J. The present bill is brought by Gass to be relieved from his suretyship and liability under the bond given to Stinson, upon several grounds. In the first place, he insists, that the nature and character of the suretyship were essentially changed after the execution of the bond, without his consent, by a contract (commonly called a contract of sale and return), by which in effect James, instead of a mere agent, became a conditional purchaser of the granite, liable, if he sold it for certain stipulated prices, and for all the bad debts contracted under his own sales, however faithful might be his conduct, in the course of his agency. In the next place he insists, that he did give notice of his dissatisfaction at remaining surety to Stinson, who waived any formal notice; and he was thereupon entitled to be discharged from all liability for the future agency of James. In the third place he insists, that a bond with new sureties was accepted from James with the avowed understanding of its being a substitute for that originally given by Gass. In the fourth place, he insists that a certain contract, called the New Orleans contract, by which James and another engaged to furnish granite for building a bank at New Orleans, which was made known to and acted upon by Stinson, and for which the granite, charged in the account against James, was furnished by Stinson, is in no sense a contract or proceeding appertaining to the agency, for which Gass is liable under his bond. All these various matters are insisted upon in some form or other in the charges in the bill, and in the argument at the bar on behalf of Gass, and they are all denied in the answer and in the argument on the other side.

Before proceeding to a consideration of these matters, thus put directly in contestation by the parties, it is necessary to dispose of one or two preliminary points, which grow out of the collateral agreement stated in the case, as to the obligation and

construction of that paper. It is contended by Stinson, that he never gave any authority to the deputy warden to sign any such paper; and, that it was not a part of the original contract with Gass at the time of executing it, but was a subsequent unauthorized proceeding. And it is further contended, that the true interpretation of the agreement, if valid, is, that the settling of the accounts of the agency, paying the balance, and delivering over the property of the prison in the hands of James, constitute a condition precedent to the right of Gass to avail himself of the written notice. It appears to me, that the true and reasonable interpretation of the instrument, is, that Gass upon giving the ten days notice was entitled to be discharged from his liability, or, as the instrument phrases it, "to discontinue his liability" for the future proceedings of James, remaining, however liable for the balance then due to Stinson, and for the delivering over of the other property, then in his hands. Upon any other construction, Stinson and James, by any arrangement between themselves, as to continuing the agency, or as to not settling the accounts, or not requiring such balance or property to be paid or delivered, would have it in their power to defeat the whole intent of the instrument, and to hold Gass to an indefinite responsibility as surety. It seems to me, therefore, that the natural interpretation of the terms of the agreement is, that the proviso is not a condition precedent to the right of Gass to liberate himself from future suretyship, but is a qualification of the effect of the notice, as to his discharge from liability for antecedent proceedings under the agency.

The other point involves considerations of a very different nature; and in one aspect would be decisive of the case against Stinson. If, as Stinson in his answer, solemnly affirms, he gave no authority to the deputy warden to enter into this collateral agreement with Gass, and it was a stipulation on the part of Gass at the time of executing the bond, that it should be entered into, thus forming the substratum of his suretyship, it is very

clear, that the bond and agreement must, as to Gass, be treated as nullities; for neither instrument in such a case could operate unless both did, the one being the motive for the other. But I am abundantly satisfied, that the collateral agreement, though executed after the bond, on the same day, was understood by all parties to be a part of the *res gestæ*, and the very condition of Gass's assuming the suretyship. And I am also as well satisfied, that as Stinson accepted and acted upon the bond with a full knowledge of the nature and effect of the collateral agreement without objection; and, indeed, as some of the evidence shows, with a positive adoption of the latter; it must be taken to be a final ratification of the whole transaction on his part, and binding upon him. In the whole course of the subsequent negotiations and proceedings there is not a tittle of evidence establishing his disapproval of it.

We may now proceed to the examination of the other questions in the case. In respect to the first, viz. the change of the relation between Stinson and James, from that of a mere agency in the sale of granite to third persons, to that of a conditional purchase, or sale and return, I entirely agree with the argument at the bar, that, if made out in point of fact, it is so total a departure from the true nature of the original agency, and involves so much more responsibility and risk, that it will amount to a discharge of Gass; or rather, the transactions will fall without the condition of the bond. The difficulty is in coming to the conclusion, that the fact is precisely made out. Stinson explicitly denies it in his answer. James as explicitly affirms it in his deposition. His competency as a witness in this case has been objected to; but I cannot perceive, what interest he has in the present suit, to which he is not a party, and by the event of which he can neither gain nor lose. If the plaintiff succeeds in the suit, James is not discharged from his liability; if he fails, the costs must be exclusively borne by the plaintiff. The case of *Riddle* v. *Moss* (6 Cranch. R. 206) is distinguishable. There

the surety was sued at law on the bond; and his principal, who was offered as a witness, had made over his property to the surety to indemnify him for the event of that very suit. The Court on this account, as well as that his liability would be increased to the extent of the costs of the suit, if the judgment was for the plaintiff, held the principal an incompetent witness. It appears to me, however, as the result of the subsequent correspondence and acts of the parties, that the proposal contained in the letter of the 12th of February, 1831, by which Stinson proposed to change the former agreement, under which James was to receive a commission of five per cent. upon his sales of granite, and to substitute a low price of the granite, so as to give James the full benefit of the extra price of the sales, was never definitively acted upon by either party. No account is shown, in which it was ever adopted as the basis of any settlement; and there is a subsequent letter of James (8th of April, 1831), in which he says "I must have pay for trucking and commissions on all I sell; unless, I cannot live." So that it appears to me, that the denials of the answer ought under all the circumstances to prevail over the positive assertions of James on this point.

But this leads me to the consideration of the New Orleans contract, and whether it can be treated as a transaction within the scope of the agency. The nature of this transaction was as follows: On the 15th of August, 1831, a special contract was entered into between James and one Hastings (then his partner in business), on the one part, and Reynolds and Zacharie of New Orleans of the other part, by which the former agreed to furnish the latter with all the stone for a bank building at New Orleans of certain specified dimensions and sizes, to be shipped at specified periods, for the gross amount of ten thousand dollars, under a penalty or rent (as it was termed) of five hundred dollars per month, for every month, which should elapse after the stated periods of shipment at Boston. After the making of this contract, which was made known to Stinson,

James wrote from time to time to Stinson for such stone as he wanted for the undertaking; all of which was furnished to him by Stinson, and charged to him in account. It does not appear, that Stinson had any other participation in the New Orleans contract, than by supplying the stone from time to time for the same. James in his bill insists, that Stinson agreed to furnish the stone at the periods stipulated in the contracts, and claims damages for losses sustained by him from his inability strictly to perform the same, in consequence of the default of Stinson. The answer of Stinson explicitly denies any participation in the contract, and any agreement to comply with its stipulations.

Now, upon this posture of the case, the question arises, whether the stone, supplied to James under the then New Orleans contract, can properly, as against Gass, be deemed a part of the business of the agency, for which he is responsible. I think it cannot. So far as the supplies went to James avowedly to fulfil this contract, they must be treated as absolute sales to James or to James and Hastings, and not deliveries to James to be afterwards sold by him under the agency. It is impossible, that he could be at once agent and vendee; that he could negotiate as agent to sell to himself as purchaser. Reynolds and Zacharie never contracted at all with Stinson, directly or indirectly; but with James and Hastings only. Stinson, in making the supplies of stone to James treated him as the absolute debtor for the stone, as soon as received by him, and charged him therefor as purchaser. A purchase is in no just sense an agency; a contract to sell to an agent is in no just sense a contract by an agent to sell for his principal. Not knowing the exact state of the accounts, between the parties, independent of this transaction, I am unable to say, what will be the effect of this view of the matter as to Gass's responsibility.

I proceed, therefore, in the next place to the consideration of the question as to notice by Gass to Stinson of his dissatisfaction with continuing his suretyship; and of the waiver of any formal notice by Stinson, and his assent to discharge Gass.

It appears from the evidence, that at the time, when the bond was given, Gass was a stone-cutter in Boston in the employ of James, then a wharfinger in Boston, and concerned in the sale of stone. In September, or October, 1831, Gass left the regular employment of James, and set up business for himself, which was a cause of dissatisfaction to James; and it is in a very high degree probable, that about this period, Gass intimated his wish to James to be absolved from his suretyship in future. On the 20th of September, 1831, James wrote a letter to Stinson stating, that Gass was going into the granite business soon; that he was daily interfering in contracts, that happened under his immediate observation; that he, James felt well persuaded, that he had been a great injury to the sale of many stone on his wharf; and he then added: "Entertaining the above views respecting his universal interference in my concerns, I have come to the conclusion to ask the favor of you to fill up a new bail-bond, and forward it enclosed in a letter by mail as early as possible, and immediately on my receiving it I will have it signed by a man, that will be satisfactory to you and all concerned, and remit it to you for your inspection. If the person is satisfactory to you, after you have made investigation, on the reference I shall offer respecting it, you will oblige by sending me the old bond, signed by Gass &c." On the 20th of the same month the deputy warden replied; "If it will be of as much benefit, as you say it will, we have no objection to your changing your surety; all we want is to have things about right; and if Mr. Gass does not answer your purpose, you can get a better one. As soon as we can possibly get time we will send you a copy of the obligation, and you may see, what you can do with it." On the 29th of September, 1831, the deputy warden wrote a letter to James, in which he said; "We have sent you a copy of the bond varying only, where it says, 'for what may have been done since the 27th January.' This variation will make it the same, as though it was signed at the time the other was written, and will agree with the commis-

sion you have, appointing you agent dated 27th January. You can get, who you please on the bond, one or two, as you like, and forward it; and if acceptable, we will exchange with you." On the 4th of October, 1831, James enclosed the same bond with certain persons proposed in pencil as sureties. On the 9th of the same month, Stinson acknowledged the receipt of the bond, and added; "I can only say, the names of the sureties are strangers; presume they are good; but wish to have it to say to the executive, I know them to be good. Mr. T. or myself will be down in all this month, and will then adjust the business satisfactorily." This bond does not appear ever to have been executed or accepted. On the 13th of October, James wrote to Stinson; "If it would not discommode you, you would confer on me a favor, a great favor, to give up the old bond, as Mr. Gass considers me as beholden to him on that account, and takes the advantage of it, having lately commenced the granite business near my wharf, and still expects me to employ his men at any price, he may choose to charge." On the 16th of October, the deputy warden, in the absence of the warden, wrote to James, saying, that he could not say, what would be his (the warden's) course respecting the bonds. He does not know Mr. Sanborn, nor Mr. Hastings (the proposed sureties). All he wants is to be able to say to the directors, that the bond is perfectly good. If he can be satisfied, that they are good, he will willingly exchange with you. I shall be in Boston the last of this month, and then we can arrange it, I think." On the 8th of November, 1831, the deputy warden wrote to James, saying; "We sent you the copy of the bond sometime since; have not heard any thing of it yet." What bond this refers to, does not distinctly appear. On the 10th of November, James & Co. by their clerk, wrote to Stinson, saying; "We have received the bond; but have been so very busy with shipping stone, that I have not had time to attend to it; but will soon." The bond here alluded to probably was the

copy referred to in the letter of the 8th, and probably also was that, which was soon afterwards executed by one Amos C. Sanborn, and one Joseph Hastings, as sureties, and was received by Stinson, and never afterwards returned to James. Stinson, however, in his answer, denies, that it was satisfactory to him or ever accepted by him; and says, that he retained it sometime in order to redeliver it to James, when he should come to Concord, (N. H.) But he does not pretend, that he ever returned this bond; and he says "he does not know, what became thereof." It is proved by Hastings and Sanborn, that the bond was never returned to them, and by James, that it was never returned to him; and that no notice was ever given to either, that it was not accepted by Stinson. On the contrary, James expressly asserts, that no dissatisfaction was ever expressed by Stinson, respecting the sureties, and that on one occasion he expressed himself satisfied with the bond. Be this, as it may, it is very clear, that the bond was never returned to James, or the sureties; and I cannot but express myself under some difficulty in avoiding the conclusion, that its being retained affords some, if not cogent evidence, that it was satisfactory, and was in fact accepted. It was the duty of Stinson to return it forthwith, if he did not mean to accept it, and to give notice thereof to the parties interested in that bond. His omission to do so, under all the circumstances of the present case, cannot but afford a presumption, that it was accepted. I am aware, that the language of the letter of Stinson to James, of the 19th of April, 1832, leads to a different conclusion; and, indeed, it is the principal source of my doubts on the subject.

But I should be sorry to place the decision of this part of the case upon the mere fact of an acceptance of the new bond, even if the presumption were stronger than it is, as I am of opinion, that the whole subsequent conduct of Stinson demonstrates, that he afterwards had full notice of the dissatisfaction of Gass in remaining a surety; that he waived any formal notice in writ-

ing of his (Gass's) wishes to discontinue his suretyship; that he intentionally lulled Gass into the belief, that he required no other notice; that he had no claims on him under the old bond; and that he did not mean to insist upon any settlement according to the terms of the proviso. Under such circumstances, if clearly made out, there can be no doubt, that Gass is entirely discharged from his suretyship in regard to all transactions subsequent to that notice and waiver. The written correspondence of James & Stinson, in September, October, and November, 1831, do, as I think, furnish a good deal of internal evidence of a knowledge on the part of Stinson, that Gass, as well as James, was then desirous of his being relieved from the suretyship; and, taken in connexion with the deposition of James and of the other witnesses for the plaintiff, there does arise a strong presumption of the fact, notwithstanding the rebutting evidence on the other side. Indeed, if the plaintiff's depositions are to be believed, there is the most conclusive evidence, that Stinson repeatedly admitted, that he was willing to give up the old bond; and that he had no claim under it upon Gass; and that he excused himself from his repeated promises to deliver it up by subterfuges and evasive pretences, which varied at different times, but which all admitted, by implication, that Gass was entitled to be discharged. And, although the answer strenuously denies these allegations, I am not satisfied, that, in this respect, as well as in some other respects, it stands sufficiently supported to give it entire credence.

But, what I rely on, is, that the answer itself admits, that in the spring of 1832 (though not before) an application was made by Gass to Stinson, in Boston, to deliver up the old bond; and that he, Stinson, then stated to Gass, that he could not, consistently with his duty as a public officer, give up the original bond without receiving another with a satisfactory surety; that James had proposed substitutes, but none were satisfactory; and he, Stinson, was ready to receive a sufficient substitute. The

answer also admits, that the brother of Gass did twice or thrice in Concord converse with him on the same subject, and for the same purpose. But it denies, that he, Stinson, ever promised to give up the bond, unless all the accounts were settled by James, the balance paid, and the remaining property of the prison delivered over to him. Now, without stopping, at present, to consider, whether the answer is, under all the circumstances, satisfactory on this head, it is material to state, that here notice is actually brought home to Stinson, in the spring of 1832, of Gass's dissatisfaction, and of his desire to discontinue his suretyship, and to have the old bond given up. No objection whatsoever was made as to the form or manner of the notice; and the objection to the delivering up of the old bond (which was a very different matter from the termination of the suretyship), was put upon a distinct ground, not touched in the collateral agreement, and not required by it, viz. the giving of a new bond with new sureties. Stinson had no right to insist, that the new bond should be given before the discontinuance of Gass's suretyship, whatever he might insist on before a delivering up of the old bond. I think, therefore, that Stinson must be taken to have dispensed with any formal notice in writing by Gass of his intention not to be held to any suretyship for the future conduct of James in his agency.

There is a letter of the 19th of April, 1832, from Stinson to James, which shows, how earnestly Gass was at this time pressing his claim to deliver up the bond. It begins thus: "Mr. Gass is pressing us hard to give up the bond. We know not what to do. Has sent to his brother, J. P. Gass, two or three times, to come and see us; says he shall come up this week himself, if the bond is not sent. Had you not better see him, and say to him to remain easy. I know of no cause of his requesting this. I suspect he is not satisfied, because you do not employ him to cut stone. So far as I am interested personally, I should feel easy with your own paper. But you know the

duty we owe the State. I hope you may get some good man; and let Mr. Gass off, as he is so anxious, &c. I think, however, if you say to Gass, you shall settle up in June or July, and then will get some one else, if we require it, he will be satisfied—I think he ought." It is apparent from this letter, that Stinson had not, at that time, any intention to revoke James's agency, or to close his accounts, or to insist upon the delivery up of the granite remaining in his hands. On the contrary, his object was to continue the agency, and to lull Gass into security.

On the 4th of June, Stinson wrote a letter to Gass, in which he says, "On my return home, I looked to the bond, and also to the certificate given you by Mr. Thompson (the deputy warden), which specifies the bond to be given up on ten days notice, provided the accounts be all settled, &c. By referring to the certificate you have of Thompson's, you will see it, as above stated. You know what I said to you, as to the propriety of our holding the bond, when I saw you the other day, and you yourself must be satisfied of the propriety of it. I am at a loss to know your anxiety to get it up, other than Mr. James's not employing you to prepare stone. Mr. Thompson, or myself, will be in Boston soon, and shall then settle with Mr. James, and relieve you of an unnecessary anxiety." On the same day Stinson wrote to James, and said, "After I saw you, Mr. Gass pressed me hard for the bond, and demanded it as a matter of right. I told him, why and wherefore I wished it, and the reasons I stated to you, &c. I tried to make him quiet; but he said, if I did not send the bond, he should come up this week. Would it not be well for you to see him, and say to him, that so soon as the New Orleans job was done, you should settle with us and discharge him. Of this course you will judge." On the same day Thompson also wrote to James, and said, "Major Stinson wrote to-day to you about Gass; he also wrote to Gass. I think you need not be any worried about him, as he will be still, we think." Now, it seems to me clear, from these

letters, that Stinson was trying to lull Gass into security; that he was seeking to evade the just rights of Gass to a termination of his suretyship; and that he was postponing a final settlement of the accounts with James, in order to answer his own particular purposes. There is a total silence in all these letters as to any existing claim against Gass, under his suretyship.

If we pass from this documentary evidence to the testimonial evidence of the plaintiff, it is most manifest, if that evidence is believed, that Stinson had the fullest notice, that Gass wished to discontinue his suretyship; that Stinson either had written notice thereof, or waived it; that he admitted Gass had fully entitled himself to the exercise of this right; that he lulled Gass into the belief, that he required no further notice; that he had no claim against Gass under the bond; and that he would surrender the bond to him. There is some portion of the testimony of the defendant's witnesses, which is in conflict with the testimony of the plaintiff's witnesses on these points. But after making every deduction, I am constrained to come to the conclusion, that the weight of the evidence, as well as of the corroborative circumstances, is decidedly in favor of the plaintiff. It appears to me, that the latest period, to which the notice can be referred, and to which Gass's liability can be prolonged, is the close of the month of April, 1832. The subsequent retainer of Gass's bond was a violation of the reiterated promises, made to him, to deliver it up; and it was for purposes, and under pretences wholly beside any avowed intention to hold Gass responsible for any balance then due, or supposed to be due, from James. In short, the reasons assigned by Stinson for retaining the bond, according to the plaintiff's witnesses (to which I on the whole give credit), were of a nature wholly personal to Stinson, and excluded any notion of a continuing liability on the part of Gass.

In cases of this sort, where a bond is given for the fidelity of a party for an indefinite period, I am aware, that it has been

supposed, that at law the obligation created by the bond cannot be determined at the will of the surety by notice. That was intimated by Mr. Justice *Bayley* in *Calvert* v. *Gordon* (7 Bar. & Cresw. R. 809), and afterwards confirmed by the whole Court, in the same case, in 3 Manning & Ryl. R. 124. That doctrine may well be maintainable at law. I am aware, that the same doctrine seems to prevail in equity; for in the case of *Gordon* v. *Calvert*, before the Vice Chancellor (2 Simons R. 253), and again in the same case, before the Lord Chancellor (4 Russ. R. 581), it seems to have been held, that notice would not terminate the liability; and that it was no more a defence in equity, than at law. I confess, that I should yield with more reluctance to this latter doctrine, though I am by no means prepared to say, that it is not maintainable. The case of *Shepherd* v. *Beecher* (2 P. Will. 288), is distinguishable in several respects. In the first place, the father gave no notice, that he would not be liable on the bond for the future delinquencies of his son; but only requested, that the master would not trust him with any cash, at least, that he would do it sparingly. In the next place, the bond was for the fidelity of the son during the specified term of his apprenticeship of seven years.

But it is wholly unnecessary, in this case, to decide, what would be the effect of notice generally in equity in the case of a bond for an indefinite period; because, here, it is matter of express contract. And my judgment is, that, taking all the circumstances together, all the parties understood, that the liability of Gass as surety was terminated by a notice, sufficient for that purpose, at farthest at the close of the month of April, 1832; and that he ought not to be held responsible for any subsequent transactions under the agency of James.

It was suggested by the counsel for the defendant, in opening the argument, that the question as to the effect of the supposed change of the contract from a mere agency to a conditional purchase, or sale and return, was a defence open at law;

and, therefore, not properly matter for equitable relief. That is true, if it constituted the whole matter of the bill. But the jurisdiction of a Court of Equity is invoked in this case for other purposes and other relief, for a discovery, for an injunction to the proceedings at law, and for other general relief upon all the merits, which a court of law is incompetent to administer.

What I propose to do is, to refer it to a Master, to ascertain the state of the accounts between Stinson and James upon the principles above stated, unless the parties agree to the statement annexed to the Auditor's report in the suit at law. If nothing shall appear to be now due to Stinson from James, as a balance of accounts for any debts of the agency, contracted before the end of April, 1832, then Gass is entitled to be discharged altogether. If any balance is due, then he ought to be held liable therefor.

Considering the suit at law as having been placed under the power of the Court, for the purpose of administering substantial justice between the parties, it appears to me, that that will be perfectly attained by accepting the Auditor's report in that suit, and entering a joint judgment thereon against both James and Gass; and then to require Stinson to stipulate on record, not to execute any execution issuing on the said joint judgment against Gass, except for such sum as the Court shall direct to be levied by its own order indorsed on the execution.

CIRCUIT COURT OF THE UNITED STATES.

Spring Circuit.

MASSACHUSETTS, MAY TERM, 1837, AT BOSTON.

BEFORE { Hon. JOSEPH STORY, Associate Justice of the Supreme Court.
Hon. JOHN DAVIS, District Judge.

UNITED STATES *v.* JOHN MATTHEWS AND ANOTHER.

Where there is a deviation from the voyage in the shipping articles, a refusal of the seamen, subsequently, to do duty on that account does not amount in law to an endeavor to commit a revolt, under the Act of Congress of 1835, ch. 40, s. 2.

INDICTMENT against the defendants, for an endeavor to commit a revolt on board of the brig Juan, Franklin Hall, master. Plea, not guilty.

At the trial it appeared, that, by the shipping articles, the defendants shipped at Boston on the 16th of October, 1836, on board the brig for a voyage "from Boston to the Penobscot River, and from thence to the West Indies, and back to a port of discharge in the United States." The brig sailed on the voyage on the 16th of October, 1836, and went from Boston to Frankfort, on the Penobscot River; and from thence, sailed for Matanzas, first intending to touch on her way at Boston, to take on board the owner (Mr. Clarke), who was to go in the brig to Matanzas. The brig arrived in Boston, and came to anchor in Nantasket Roads; and Mr. Clarke then came on board. But

the defendants then refused to do any further duty on board, insisting that there was a deviation from the voyage in the shipping articles, and that they were not bound to go farther.

Upon this state of the facts the question arose, whether the defendants were discharged, or not, or were guilty of the offence charged in the indictment for such refusal to do duty on board.

Mills, District Attorney for the United States. No counsel for the defendants.

Story J. The Court are of opinion, that under the circumstances stated in the evidence, the refusal of the defendants to do farther duty on board was justifiable, and was not an endeavor to commit a revolt within the statute of 1835, ch. 40. The touching at Boston was not provided for in the shipping articles, and was a clear deviation from the voyage, which discharged the seamen from any obligation of proceeding farther on the voyage. The defendants ought therefore to be acquitted.

Verdict, not guilty.

Elisha D. Hurlbert and another

v.

The Pacific Insurance Company.

The right of set-off is limited, at the common law, to cases of mutual connected debts, and does not extend to debts, which are unconnected with each other.

Where an insurance was effected by an agent, for the benefit of whom it concerned, and a loss was incurred, and the agent brought an action against the underwriters in his own name, for the benefit of the owners of the ship, *held*, that the underwriters could not set off debts or demands, due from the agent in his own right, against the amount claimed for the loss.

A policy of insurance, wherein the underwriters insured Z. Cook, Jr. for E. D.

Hurlbert & Co. for whom it concerns, payable to E. D. Hurlbert & Co., contained the following clause; "And in case of loss, such loss shall be paid in sixty days after proof and adjustment thereof, the amount of the premium note, if unpaid, and all sums due to the company *from the insured*, when such loss becomes due, being first deducted." An action was brought in the name of E. D. Hurlbert & Co., agents, for the benefit of the owners of the ship. *Held*, that the premium note was to be deducted, whether given by the agent or principal, and that the words, *the insured*, applied not to the party, who procured the insurance, but to him for whose benefit it was made, as the owners in the present case.

Quære, if the principal, in the policy above-mentioned, could, with the consent of the agent, sue at common law in his own name.

Quære, if a broker, who acts under a *del credere* commission, may be considered as the primary debtor to his principal, and, therefore, to all intents, the insured.

ASSUMPSIT on a policy of insurance, dated the 1st of September, 1836, whereby Z. Cook, Jr. for E. D. Hurlbert & Co., for whom it may concern, payable to E. D. Hurlbert & Co. caused to be insured, lost or not lost, $3,000 on the schooner *Flora*, at sea or in port, for twelve months from the 15th day of September, 1836, at noon, and if at sea, on the expiration of the year, to continue at *pro ratâ* premium, until her arrival at her port of destination against the usual perils. The declaration averred a total loss by the perils of the seas within the term aforesaid.

The cause came on to be heard upon a statement of facts agreed by the parties, as follows:

The plaintiffs are commission merchants, resident in New York; and as agents for their employers, frequently cause insurance to be made in Boston by Mr. Z. Cook, Jr., who has general instructions from them to have all policies effected by their orders made "for whom it concerns payable to them."

The insurance in this case was so effected by Mr. Cook, by the orders of the plaintiffs, in behalf of the owners of the vessel insured, who reside in Connecticut.

The defendants being liable to pay a total loss on this policy, claim the right to deduct from its amount all sums due and pay-

able to them by the plaintiffs, and to have payment or security for the sum of all the premium notes becoming due to them, on which the plaintiffs are promisors.

The parties in interest deny the right of the defendants to deduct any but the premium note given for this insurance.

A copy of the policy makes part of this statement; the defendants are to have all the benefit they could derive by force of the provisions of the policy, or by an account duly filed in set-off, which is to be considered as done; no statement of interest under this policy was made to the defendants prior to the loss being claimed.

The policy was in the following words:

This policy of insurance witnesseth, that the President and Directors of the Pacific Insurance Company in the city of Boston, do by these presents cause Z. Cook, Jr. for E. D. Hurlbert & Co., for whom it concerns, *payable to E. D. Hurlbert & Co.*, to be insured, lost or not lost, three thousand dollars on the schooner Flora, (at sea or in port, for twelve months from the fifteenth day of September, 1836, at noon, and if at sea on the expiration of the year, to continue at *pro ratâ* premium until her arrival at her port of destination. The assured may cancel this policy after the expiration of six months, or at any time, should the vessel be sold) whereof is master for this present voyage, ———, or whosoever else shall be master in the said vessel, or by whatsoever other name or names the said vessel, or master thereof, is, or shall be named or called: beginning the adventure upon the said schooner as aforesaid, and to continue during the voyage aforesaid, on the vessel until she shall be arrived and moored at anchor twenty-four hours in safety, and on the property until landed.

And it shall be lawful for the said vessel, in her voyage, to proceed and sail to, touch and stay at, any ports or places, if thereunto obliged by stress of weather, or other unavoidable accidents, without prejudice to this insurance.

Touching the adventures and perils, which the said Insurance Company are contented to bear, and take upon them in this voyage, they are, of the seas, fire, enemies, pirates, assailing thieves, restraints and detainments of all kings, princes, or people, of what nation or quality soever, barratry of the master (unless the insured be owner of the vessel), and of mariners, and all other losses, and misfortunes, which have, or shall come to the damage of the said schooner, or any part thereof, to which insurers are liable by the rules and customs of insurance in Boston: provided, that the insurers shall not be liable for any partial loss on hemp and flax, unless the loss amount to twenty per cent. on the whole aggregate value of such articles; nor for any partial loss on sugar, flaxseed, bread, tobacco and rice, unless the loss amount to seven per cent. on the whole aggregate value of such articles; nor for any partial loss on salt, grain, fish, fruit, hides, skins, or other goods that are esteemed perishable in their own nature, unless it amount to seven per cent. on the whole aggregate value of such articles, and happen by stranding; nor for any partial loss on other goods, or on the vessel, or freight, unless it amount to five per cent. exclusive, in each case, of all charges and expenses incurred for the purpose of ascertaining and proving the loss; but the owners of such goods shall recover on a general average. And in case of any loss or misfortune, it shall be lawful for the insured, their factors, servants, and assigns, to sue, labor, and travel for, in and about the defence, safeguard, and recovery of the said schooner, or any part thereof, without prejudice to this insurance, to the charges whereof, the said Insurance Company will contribute, in proportion as the sum insured is to the whole sum at risk. And so the President and Directors aforesaid, are contented, and do hereby bind the capital stock and other common property of the said Insurance Company, to the insured, their executors, administrators, and assigns, for the true performance of the premises, confessing themselves paid the consideration due

unto them for this insurance, by the insured, at and after the rate of eight per cent. per annum, to return *pro ratâ* premium for time not used.

And it is hereby agreed, that if the insured shall have made any other insurance upon the schooner aforesaid, prior in date to this policy, then the said Insurance Company shall be answerable only, for so much as the amount of such prior insurance may be deficient towards fully covering the property at risk, whether for the whole voyage, or from one port of lading or discharge to another; and the said Insurance Company shall return the premium, or a ratable part thereof, upon so much of the sum by them insured, or for such part of the voyage as they shall be exonerated from by such prior insurance, provided, that no return premium shall be made for any passage, whereon the risk has once commenced. And in case of any insurance upon the said schooner, whether it be for the whole or part of the voyage, subsequent in date to this policy, the said Insurance Company shall nevertheless be answerable, to the full extent of the sum by them herein insured, without right to claim contribution from such subsequent insurers; and shall accordingly be entitled to retain the premium by them received, in the same manner, as if no such subsequent insurance had been made. And in case of loss, such loss shall be paid in sixty days after proof and adjustment thereof, the amount of the premium note, if unpaid, and all sums due to the Company, *from the insured*, when such loss becomes due, being first deducted, and all sums coming due being first paid or secured to the satisfaction of the said President and Directors, they discounting interest for anticipating payment. It is also agreed, that in case of capture or detention, the insured shall not have the right to abandon therefor, until proof is exhibited of condemnation, or of the continuance of the detention (by capture or other arrest) for at least ninety days; and that the insured shall not abandon in consequence of the port of destination being blockaded, but the vessel shall, in

such case, have liberty to proceed to another port not blockaded, and there end the voyage, or wait a reasonable time for the blockade of the original port of destination to be raised: and that the acts of the insured or insurers in recovering, saving, and preserving the property insured in case of disaster, shall not be considered a waiver or acceptance of an abandonment.

It is also agreed, that the insurers shall not be answerable for any charge, damage, or loss, which may arise in consequence of seizure, or detention, for, or on account of, illicit or prohibited trade, or trade in articles contraband of war; but the judgment of a foreign consular, or colonial court, shall not be conclusive upon the parties, as to the fact of there having been articles contraband of war on board, or as to the fact of an attempt to trade in violation of the laws of nations. It is also agreed, that this policy shall be void in case of its being assigned, transferred, or pledged, without the previous consent in writing of the insurers. It is also agreed, that the insured shall not have the right to abandon the vessel for the amount of damage merely, unless the amount which the insurers would be liable to pay, under an adjustment as of a partial loss, shall exceed half the amount insured: and in case of a total loss of the vessel with salvage, the amount allowed out of the salvage to the officers and crew, for wages earned, or services rendered previously to the loss, shall be considered as so much of the salvage applied to the use of the ship owners, even although the same should be allowed or paid under the name of salvage, and not as wages, and shall accordingly be deducted in adjusting the loss. It is further agreed, that if any dispute shall arise, relating to a loss on this policy, it shall be submitted to the judgment and determination of arbitrators, mutually chosen, whose award in writing shall be conclusive and binding on all parties. The Company is not liable for wages or provisions, except in general average.

In witness whereof, the President of the said Pacific Insurance

Company, hath hereunto subscribed his name, and caused the same to be countersigned by their Secretary, at their office in Boston, this first day of September, one thousand eight hundred and thirty-six.

The cause was argued by *F. C. Loring* for the plaintiffs, and by *C. P. Curtis* for the defendants.

STORY J. The only questions arising upon the statement of facts are, 1st. As to the right of set-off of the defendants of the demands, which they hold against the plaintiffs; 2d. As to the right of deduction of the same demands under a particular clause in the policy, which will be presently brought under notice.

In regard to the right of set-off, either at the common law, or under our statute of set-off (Revised Statutes, ch. 96), it appears to me, that upon the circumstances of the present case it is not at all maintainable. However true it may be, that the right of set-off of mutual demands between the parties is founded in natural justice and equity,[1] (a proposition, to which I give my full assent), it is very certain, that the common law has not carried this right into full effect; for by that law the right of set-off is limited to cases of mutual connected debts, and does not extend to debts, which are unconnected with each other. The present case is not one of mutual connected debts. In regard to our Revised Statute of set-off, although it has enlarged the doctrines of the common law, there is no clause in it, which reaches, either in its language or its spirit, a case like the present. It is limited, with few exceptions, to mutual debts or demands between the parties to the action; and it contemplates only such mutual debts and demands, as are due in the same right. In the present case, the suit is brought by the plaintiffs, as mere agents

[1] See *Green* v. *Farmer*, 4 Burr. R. 2220, 2221. *Briggs* v. *Richmond*, 10 Pick. R. 391. 2 Story's Comm. on Equity Jurisp. ch. 37, § 1432 to § 1444.

for the benefit of the owners of the Flora. They sue *in autre droit*. The debts or demands sought to be set off, are not the debts or demands due by these owners; but by the plaintiffs in their own right. So that the suit and the set-off are not in the same right. The case of *Gordon* v. *Church* (2 Caines R. 293), is also a direct authority against allowing a set-off under such circumstances upon general principles.

Then, as to the second question. The clause in the policy is in the following words. "And in case of loss, such loss shall be paid in sixty days after proof and adjustment thereof, the amount of the premium note, if unpaid, and all sums due to the Company *from the insured*, when such loss becomes due, being first deducted; and all sums coming due, being first paid or secured to the satisfaction of the said President and Directors, they discounting interest for anticipating payment." The whole question, as to the construction of this clause, turns upon the point, who is "the insured" within its true intent and meaning; for it is clear, that the debts and demands due from that person, and from him alone, are to be recouped from the amount due on the policy. It has been argued, that, by the insured, must be here intended the party, in whose name the insurance is proved to be made; and who may sue for the loss; and, especially, where he is the party, to whom the amount is to be paid in case of loss, and who, therefore, is exclusively entitled to sue on the policy. In the present case, the policy expressly declares, that in case of loss the amount shall be paid to the plaintiffs; and it is added, that, upon any other construction, even the premium note itself upon this very policy could not be deducted.

As to this last suggestion, it appears to me, that no such consequence would follow, as the argument supposes. It seems to me, that the true interpretation of the clause authorizes the deduction of the premium note at all events, by whomsoever it may have been given. But it authorizes no other deduction, except of debts or demands due from the insured. In the ordi-

nary case of a suit brought by the principal, who has procured the policy to be made by an agent in his own name, the premium note cannot, unless under special circumstances, be set off, if it has been given by the agent, binding himself personally; because the suit is brought for the right of the principal, and the premium note is the agent's own debt. The case of *Gamsde* v. *Pigou* (4 Taunt. R. 246) seems to have proceeded upon this ground.[1] The clause was, therefore, probably introduced to entitle the underwriters at law to deduct the premium, whether the suit was brought in the name of the principal or of the agent.[2]

It appears to me, that the insured, in the sense of the clause, must mean, not the party, who procures the insurance; but the party, for whose benefit the insurance is made. He, and he only can properly be said to be the insured; for he is ultimately to pay the premium and to have the benefit, if a loss occurs. I do not say, that this, the primary meaning of the words, may not be displaced by showing, that the parties to the contract have used them in a different sense, as the designation of the person, in whose name the policy is made. But the language ought to be very clear in its import, which should lead to such a result. The present policy does not seem to me in any manner to justify it. It is true, that by the terms of the policy the loss is payable to the plaintiffs. But on whose account? Plainly on account of the owners of the Flora, for whose benefit it was made. There is not the slightest evidence in the case, that the plaintiffs have become the owners of the policy; or that they acted under a *del credere* commission; or even that they have a lien upon the same for any balance of accounts. The probability is, that the money was made payable to them, solely to

[1] See also *Cumming* v. *Forester*, 1 M. & Selw. 494, 499. *Leeds* v. *Marine Insurance Company*, 6 Wheat. R. 565.

[2] See *Maams* v. *Henderson*, 1 East R. 335.

secure their ordinary commission for the negotiation. The object of making the loss payable to the plaintiffs, is not to change the character of the insurance itself, and to make it an insurance for the agent, and not for the principal; for then the party, having no interest in the property insured, and not the party sustaining the loss, would be entitled to the benefit of the insurance. But the object is, to entitle the agent to sue in his own name for the loss, and to receive it without that right being interfered with by the principal. The principal is still, however, the insured; and the money, when received, is to be accounted for to him. This was the interpretation put upon a similar clause in the case of *The Jefferson Insurance Company* v. *Cotheal* (7 Wendell R. 72, 82). There is great weight also in the argument *ab inconvenienti*, that otherwise the debts of the agent, though unknown to the principal, might intercept, in the shape of a set-off, the whole indemnity of the principal. Whether, upon a policy thus framed, the principal, with the consent of the agent, might sue at the common law for the loss, as he clearly could, if this clause about the payment were omitted (without any distinction as to the agent's having a *del credere* commission, or not), it is unnecessary to decide. In a Court of Equity, there would not be the slightest difficulty; for, if the lien of the agent were discharged, the principal might sue for the loss in his own name, which shows, that he is to be treated as substantially the insured.

Very little light can be thrown on this subject by any references to the English decisions on set-off. Almost all the cases have turned upon the proper construction of their statutes of set-off in cases of mutual debts and mutual credits, either generally, or in cases of bankruptcy.[1] In *Dubois* v. *Grove* (1 Term Rep. 112), and *Bize* v. *Dickason* (1 Term Rep. 285), the

[1] The different statutes will be found in Babbington on Set-off, and Montagu on Set-off.

broker acted under a *del credere* commission, and having paid the losses to his principal, he was allowed to set off these losses against a claim for premiums by the assignees of a bankrupt. Under such circumstances, it may be fair, as between himself and the underwriters, the policy being made in his name, and the amount being paid, to treat him as the owner of the policy. *Moody* v. *Webster* (3 Pick. R. 424), *Koster* v. *Eason* (2 M. & Selw. 112), and *Parker* v. *Beasley* (2 M. & Selw. 423), recognise the like right of set-off where the brokers are under a *del credere* commission, or have a lien by reason of acceptances.[1] But where there is neither a *del credere* commission nor a lien, the right of set-off is held not to exist. *Parker* v. *Smith* (16 East R. 382, 386). It would, however, be a great mistake to consider *Grove* v. *Dubois* (1 Term Rep. 112), from which all the other cases have sprung, an authority to the extent of considering, that where the broker acts under a *del credere* commission, he is to be considered as the primary debtor to his principal, and therefore, to all intents, the insured. In *Baker* v. *Langhorn* (6 Taunt. R. 519), and *Peele* v. *Northcote* (7 Taunt. R. 478), Lord Chief Justice *Gibbs* repudiated such a notion.[2] Without going farther into an examination of the English cases on this particular point, resting, as they mainly do, upon the case of *Dubois* v. *Grove* (1 Term Rep. 112), a case in itself not very satisfactory in its principles, it is sufficient to say, that they furnish no general reasoning applicable to the case before the Court.

Upon the whole, my opinion is, that there is no right in the defendants to set off or deduct from the amount recoverable on this policy any sums whatsoever due by the plaintiffs to them, except the premium on the policy. *Judgment accordingly.*

[1] See also *Davies* v. *Wilkinson*, 4 Bing. 573.

[2] See also *Gall* v. *Comer*, 7 Taunt. R. 558.

United States v. James Davis.

A gun was fired from an American ship, lying in the harbor of Raiatea, one of the Society Isles and a foreign government, by which a person on board a schooner, belonging to the natives and lying in the same harbor, was killed. *Held*, that the act was, in contemplation of law, done on board the foreign schooner, where the shot took effect, and that jurisdiction of it belonged to the foreign government, and not to the Courts of the United States under the Crimes Act of 1790, ch. 36, § 12.

Quære, if the waters of the harbor of the island of Raiatea are to be deemed the high seas.

Semble, that, upon principles of international law, and independent of some statutable provisions or treaty stipulations, courts of justice are neither bound or authorized to remand prisoners for trial to a foreign government, whose laws they are supposed to have violated.

Indictment for manslaughter of a person, whose name was unknown, against the Act of 1790, ch. 36, § 12. (1 Story's Laws of United States, 84). There were two counts; one stating the offence to be committed on the high seas; the other containing a special statement of all the circumstances as to locality, &c. Plea, not guilty.

At the trial, it appeared in evidence from the testimony of the mate, that the defendant (Davis), was master of the ship Rose, an American whale ship. The ship sailed on the voyage in August, 1833. In the course of the voyage, the ship arrived at the island of Raiatea, one of the Society Islands, where she lay for ten or twelve days to recruit, and to cooper her oil. While lying there, a schooner came alongside, which belonged to some persons, who were residents of one of the islands, and was tied to the ship. The deceased was one of the crew of that schooner. Some difficulty having occurred with an Irishman who did not belong to the ship, but was employed on board; and the defendant (Davis) ordered him to be tied up and flogged, which was accordingly done by the mate. The deceased at that time

came on board of the ship, and said to the defendant, Captain Davis, do not strike the man across the loins. The defendant told him to go out of the ship, and he immediately left the ship and went on board of the schooner. The Irishman was then put in irons. Sometime after, the boat's crew of the ship Rose came on board and refused to do duty, while the Irishman remained in irons. The defendant told them to go to work. They still refused, and one of them (a blackman) took up a handspike. The defendant had previously sent for his gun below, and then had it in his hands; and the blackman having the handspike, said to him; "shoot straight, if you do not shoot me I will kill you." The defendant then ordered the mate to put the blackman in irons; and while the mate was doing it, the gun, then in the captain's hands, went off, and the mate, upon looking up, saw the deceased was shot, and fall instantly dead on the deck of the schooner. How the gun went off, whether purposely or not, did not appear. The defendant then went below. The deceased had not taken any part in this affray, and was all the time on board of the schooner until he was shot. An examination was afterwards had before the American consul at the Island, and the defendant was sent home for trial.

From the testimony it further appeared, that the deceased was not an American but was a foreigner, and was believed to be an Englishman.

From the testimony and other evidence, it farther appeared, that the island of Raiatea is surrounded or in a great part surrounded by a coral reef, which forms a fine harbor, a half mile wide from the reef to the island. At high water the coral reef is not out of water or visible; but at low water it is, as the natives may then be seen walking on the reef. At low water, the sea of course washes entirely over the reef. There are small islets about the reef, and two places only where vessels can enter. The entrances are narrow, not above twenty rods wide. Pilots are there required at both entrances, and pilotage and

port duties are paid. There is no better harbor in the South Seas; and it is not an open roadstead. The ship and schooner, at the time of the occurrence, lay within the reef about one hundred and fifty yards from the shore of the Island, about two miles from one of the entrances. The place was commonly called a harbor or port.

Upon this evidence obtained from the witness for the government; *Choate* for the defendant, without going into any evidence on his side, cited 3 Murray's Encyc. of Geography, article Raiatea, p. 159, and 2 Malte Brun's Geography, p. 294, and contended, that upon the Government's own evidence, the Court had no jurisdiction of the case. He said, that he was prepared to show, that no offence had been committed; but that the defendant had good reason to suppose, that his gun was not loaded, and only pointed it for intimidation; and that he had been tried before the king of the Society Islands, and had been acquitted. But, as he thought, the offence, if any, was not within the jurisdiction of the Court. He cited *United States* v. *McGill*, 4 Dall. R. 426.

Mills, District Attorney, said he was willing to submit the case upon the evidence, to the Court and jury.

Story J. We are of opinion, that under the circumstances established in evidence, there is no jurisdiction in this cause. The Crimes Act of 1790, ch. 36, § 12, on which this indictment is founded, gives to this Court jurisdiction of the crime of manslaughter only when committed "on the high seas." We do not absolutely decide, whether the place where this offence, if any, was committed, was the high seas or not; because that might be affected by considerations of a very delicate and difficult nature, as whether it was high or low tide; for a place may at high water be the high seas, and yet at low water be strictly a part of the land, as is the case on our seashore, according to the well known doctrine in Constable's case, 5 Co. R. 106, a.

In the present case at high water, the tide of the ocean had full sweep over the place in question; and it may be matter of grave consideration, whether, if the whole reef was at the time covered with water, the whole, including the place where the schooner lay, ought not to be deemed the high seas. But on this we give no opinion.

What we found ourselves upon in this case is, that the offence, if any, was committed, not on board of the American ship Rose; but on board of a foreign schooner belonging to inhabitants of the Society Islands, and of course, under the territorial government of the king of the Society Islands, with which kingdom we have trade, and friendly intercourse, and which our government may be presumed (since we have a consul there) to recognise as entitled to the rights and sovereignty of an independent nation, and of course entitled to try offences committed within its territorial jurisdiction. I say the offence was committed on board of the schooner; for although the gun was fired from the ship Rose, the shot took effect and the death happened on board of the schooner; and the act was, in contemplation of law, done where the shot took effect. So the law was settled in the case of *Rex* v. *Coombs* (1 Leach. Cr. Cas. 432), where a person on the high seas was killed by a shot fired by a person on shore, and the offence was held to be committed on the high seas, and to be within the Admiralty jurisdiction. Of offences committed on the high seas on board of foreign vessels (not being a piratical vessel), but belonging to persons under the acknowledged government of a foreign country, this Court has no jurisdiction under the Act of 1790, ch. 36, § 12. That was the doctrine of the Supreme Court in *United States* v. *Palmer* (3 Wheat. R. 610), and *United States* v. *Klintock* (5 Wheat. R. 144), and *United States* v. *Holmes* (5 Wheat. R. 412); applied, it is true, to another class of cases; but in its scope embracing the present. We lay no stress on the fact, that the deceased was a foreigner. Our judgment would be the same, if he had been an American

citizen. We decide the case wholly on the ground, that the schooner was a foreign vessel, belonging to foreigners, and at the time under the acknowledged jurisdiction of a foreign government. We think, that under such circumstances, the jurisdiction over the offence belonged to the foreign government, and not to the Courts of the United States under the Act of Congress.

The jury immediately returned a verdict of not guilty.

Mem. The District Judge, immediately on this acquittal, suggested for consideration, whether, under such circumstances, it was not the duty of the Court to remand the prisoner to the foreign government for trial. Mr. Justice *Story* said, that he had never known any such authority exercised by our Courts, except where the case was provided for by the stipulations of some treaty. He had great doubts, whether, upon principles of international law, and independent of any statutable provisions, or treaty stipulations, any court of justice was either bound in duty, or authorized in its discretion, to send back any offender to a foreign government whose laws he was supposed to have violated. The District Judge acquiesced in this view of the matter; and the prisoner was discharged.

HENRY FLAGG, IN EQUITY, *v.* SAMUEL H. MANN AND OTHERS.

On or about June 13th, 1823, Samuel Frye, as guardian of his minor children, under a license of Court, conveyed certain premises in Lowell, called the Paddy Camp Lands, to Luther Richardson, in fee. On the 14th of May, 1825, Luther Richardson conveyed these premises, being already subject to incumbrances, to his brother, Prentiss Richardson, by a deed of quitclaim, and upon a secret parol trust for the benefit of Luther. On the 6th of May, 1826, Luther Richardson and his wife, and Prentiss Richardson, executed a deed of quitclaim of the premises to Walker and Fisher, for the consideration of $2000 (as stated in the deed), and on the same

day, Walker and Fisher executed a bond for $10,000 to Luther Richardson alone, which recites, that "the above-named Luther Richardson has, by a deed of quitclaim, bearing even date herewith, conveyed to the above-bounden Walker and Fisher, all his right and title, &c.," and then provides, that the obligees shall reconvey the premises to Luther Richardson whenever, within five years from date, he shall repay them such sums of money as they shall expend in discharging incumbrances, and making improvements on the land. At the same time, Walker and Fisher executed to Luther Richardson a lease of a part of the premises for five years, upon the annual rent of one cent during the term, unless the premises should be previously redeemed, according to the provisions of the bond. On or before the 13th of May, 1831, a claim was set up to these premises by the heirs of Samuel Frye, grounded on a supposed invalidity of the guardianship sale thereof at a former period. Shortly after, a parol agreement was entered into between the plaintiff and the defendant Mann, to purchase at their mutual expense and benefit, the title of Luther Richardson, and to extinguish the claims of Walker and Fisher, and of the Frye heirs in the premises, on their equal and joint account. This agreement was never abandoned by the parties thereto. And on the 13th of May, 1831, Flagg and Mann, in pursuance thereof, received a conveyance of the premises by deed of quitclaim from Luther Richardson, and also an assignment of the bond of Walker and Fisher. On the 27th of July, 1831, Walker and Fisher conveyed their title in the premises to Mann alone, by a quitclaim deed. Subsequently, the Frye heirs, by deeds of quitclaim, conveyed all their title in the premises to the defendant, Adams. On the 6th August, 1831, the defendants, Mann and Adams, severally conveyed to each other, by quitclaim deeds, one moiety of the premises and of their respective interests therein. On the 8th of August, 1831, Mann conveyed, by a quitclaim deed, his moiety of the premises to the defendant Fuller, for $40,000, and Fuller, on the same day, executed a mortgage deed of the same moiety to Mann, as security for the payment of four notes, each for $10,000, given for the purchase-money. A bill in Equity was now brought, by Flagg, to set aside the deeds of Mann to Adams, and of Adams to Fuller, as made in fraud of the rights of the plaintiff, and for a reconveyance of one moiety of the premises to the plaintiff, upon payment by him of a moiety of the moneys paid in perfecting the title, and for other relief.

Held, That Luther Richardson has no interest in this suit, to render him an incompetent witness.

That the defect in Luther Richardson's original title, on account of the alleged invalidity of the guardianship sale, if such really existed, can be taken advantage of only by the Frye heirs, and others deriving title under them; and that, until the avoidance thereof by them, Luther Richardson must be deemed the lawful owner of the premises.

That the defendant, Mann, deriving his title, together with Flagg, from the purchase of Richardson, cannot set up the outstanding adverse title of the Frye heirs, to defeat the equitable rights of Flagg under the purchase on joint account, if Richardson at the time had any title in the premises.

That the agreement between Flagg and Mann being made for the purpose of protecting themselves against the claim of the Frye heirs, a Court of Equity will not allow Mann to violate that agreement by interposing the above claim to defeat the rights of Flagg, although the relation would not cause an estoppel at law

That the execution of the deed to Walker and Fisher, and the giving of the bond by them to Luther alone, with the assent of Prentiss, amounted to an execution of the secret trust between Luther and Prentiss, and is the same in effect as if Prentiss had first conveyed the premises to Luther, and the latter had then conveyed to Walker and Fisher, taking from them the bond.

That Walker and Fisher, and all persons claiming under them, are estopped, at least in equity, by the terms of the bond of Walker and Fisher to Luther Richardson, as above recited, from denying, that all which they took under the deed of Luther and his wife and Prentiss was the right and title of Luther alone.

That the deed to Walker and Fisher, and the bond by them to Luther Richardson are to be treated as part of one and the same transaction, and to have the same effect as if embodied in one instrument; and that this deed and bond, being merely an attempt to evade the strict rules of law with regard to mortgages, constitute an equitable mortgage to Walker and Fisher for their advances, and not a conditional purchase by them of the premises.

That Luther Richardson had a clear Equity of Redemption in the premises, at the time of his conveyance to Flagg and Mann, sufficient, at least in the view of a Court of Equity, to make them tenants in common, and to create between them a privity of title and estate.

That the parol agreement between Flagg and Mann, for the purchase on joint account of the premises in question, as above recited, coupled with the deed of Richardson to Flagg and Mann, and the assignment to them of Walker and Fisher's bond, created a fiduciary relation between these parties, grounded on privity of title and estate, under which a purchase of an outstanding incumbrance or adverse title by one would be a trust for the benefit of both; and on this account, the agreement, though by parol, is extracted from the Statute of Frauds of Massachusetts.

Semble, that the agreement, though by *parol*, was executed by the passing of the deed, and assignment above-mentioned, even if no actual title passed from Richardson, so as to establish a fiduciary relation between the parties, grounded merely on privity of contract, which was sufficient to make the subsequent purchases of outstanding incumbrances in trust for the joint account, and to extract the case from the Statute of Frauds.

That Mann was entitled to one moiety of the premises, which moiety was duly conveyed to Adams, without notice of the title of Flagg.

That it was not of itself a wrongful act in Mann to take the title from Walker and Fisher, and from the Frye heirs in his own name, as it was his only security to compel Flagg either to abandon those purchases, or, if he insisted on his share, to repay the advances made.

That the charges of notice of the plaintiff's title in the bill against Fuller are loose and indeterminate, amounting to a mere intimation or suspicion or belief, whereas there should have been an allegation of full notice of the very title and claim of the plaintiff asserted in the bill.

That Fuller, at the time of his purchase of Mann, had no notice, actual or constructive, of the title of Flagg.

That the deed from Mann to Fuller, although a mere quitclaim or release, must be treated as a bargain and sale, or other lawful conveyance, effectual to pass the whole estate, and entitling Fuller to protection as a *bonâ fide* purchaser without notice to the extent of the purchase-money already paid before notice of the plaintiff's title.

That Flagg is entitled to one moiety of the premises purchased of Richardson, Walker and Fisher, and the Frye heirs, and, in default of this, on account of the conveyance to Fuller, to a moiety of the purchase-money, as a substituted fund, deducting therefrom the sums paid by Mann to Walker and Fisher and to the Frye heirs, and other expenses incurred in the premises.

That for the payment of his moiety of the purchase-money, the plaintiff has a lien on the land conveyed to Fuller, to the extent of the purchase-money which remained unpaid at the time of notice to Fuller of the plaintiff's title.

An allegation in an answer, which is not responsive to the bill, is not evidence; and the *onus probandi* is on the defendant to establish it.

If a deed is found in the possession of the grantee, there is a presumption of a due delivery thereof, because then, and not otherwise, it would be in the proper custody.

A deed can never be delivered as an escrow to the grantee himself.

A Court of Equity will not yield to technical rules of law, by which the intention of parties may be defeated.

When a witness has been cross-examined by a party, with a full knowledge of an objection to his competency, a Court of Equity will not allow the party to raise the objection at the hearing.

Where two persons are in possession of lands by an imperfect or tortious title, as by disseisin, a release to one of them will enure to the benefit of both.

If parties are interested together by mutual agreement, and a purchase is made agreeably thereto, neither party can exclude the other from what

was intended to be for the common benefit; and any private benefit, touching the common right, which is secured by either party, will turn him into a trustee for the benefit of both.

A disseisor in possession has a lawful estate, which he may alien, and his alienee will have a good title as against all persons not having a paramount title.

A question of fact, which is essential to the decision of a case in Equity, may be referred to a jury to be tried upon an issue framed for the purpose.

A Court of Equity will often pronounce, that there is an equitable mortgage in cases, where a Court of Law would be compelled to say there was no mortgage.

A trust, created by a parol contract, will be enforced in Equity against a party, who does not insist upon the defence of the Statute of Frauds.

Courts of Equity do not regard the forms of instruments, but look to the intent, and give to the acts of parties that construction, which is consistent with the intent and with equity.

To constitute a conditional purchase, there must be a sale for a valuable consideration between the parties, with a right of repurchase.

If a transaction resolve itself into a security, whatever may be its form, and whatever name the parties may choose to give to it, it is in equity a mortgage; and the parties cannot, by any covenant or agreement, limit the rights of the mortgagor, or cut off his Equity of Redemption after a limited period.

The circumstance, that the grantee is not to be let into immediate possession of the estate, affords a presumption of its being a mortgage; so also does the circumstance, that the money paid by the grantee is not a fair price for the absolute purchase of the property conveyed to him.

It is not of the essence of a mortgage, that there should be a defeasance; and there may be a defeasance of a deed of conveyance, without constituting a mortgage. The question, whether a conveyance amounts to a mortgage, does not turn on this point.

Quære—If a bond given by a grantee to one of several grantors, in order to defeat and make void the conveyance, if executed at the same time with the conveyance, will amount to a technical defeasance.

The essence of a defeasance is to defeat the principal deed, and make it void *ab initio*, if the condition be performed.

Semble, that it is of the essence of the contract of sale, that there should be a fixed price for the purchase.

The courts of the United States are not concluded in a matter of general Equity jurisdiction by a decision of the State Court.

A *written* agreement by two, to purchase lands on joint account, creates a fiduciary relation between the parties, which neither is at liberty to defeat

by a purchase on his sole account, and such a purchase will be in trust for the joint account. *Quære*—If this doctrine is applicable to *parol* agreements.

Where a rightful estate is claimed by each of two purchasers, whose titles in other respects are equal, the maxim prevails, *qui prior est in tempore, potior est in jure.*

Vague reports and rumors from strangers, and suspicion of notice, though a strong suspicion, are not sufficient ground, on which to charge a purchaser with notice of title in a third person.

Semble. Possession by a tenant of an estate at the time of its purchase, is constructive notice to the purchaser of the tenant's title, though not of the title of the lessor, or of the party, under whom the tenant claims.

Courts of Equity in the United States, where the registration of deeds is universally provided for, should not enlarge the doctrine of constructive notice, or follow all the English cases on the subject, without a due regard to the circumstances and laws of our country.

In a plea of a purchase for a valuable consideration without notice of the plaintiff's title, it is necessary to aver, that the person, who conveyed, was seised, or pretended to be seised, at the time when he executed the purchase deeds.

Semble. If a *cestui que trust* in fee conveys the estate to a purchaser, and the trustee afterwards confirms the sale, and releases to the *cestui que trust*, or to the purchaser, such a purchaser is entitled to protection against any antecedent secret trust, which was unknown to him at the time of the purchase and the confirmation, although, in a strict sense, the *cestui que trust* was not seised of the estate at the time of the conveyance.

BILL in Equity, to set aside certain conveyances, alleged to have been made in fraud of the rights of the complainant, and for other relief. The bill was brought by Henry Flagg, of Barnstable, in the State of New Hampshire, against Samuel H. Mann, John R. Adams, and Elisha Fuller, of Lowell, in the State of Massachusetts. The following is an outline of the leading facts of the case:

In March, 1823, Samuel Frye, of Danville, in the State of Vermont, being the guardian of his six children, all minors, by his late wife, Polly Frye, obtained a license from the Supreme Court of Massachusetts, in due form of law, to sell certain real estate belonging to and then in the seisin of the said minor child-

ren, situate in Lowell, in the same State. He sold the same estate at public auction, on the tenth of June of the same year, under the license, and on the thirteenth day of the same month executed a deed thereof to Luther Richardson, the purchaser at the sale, in due form of law. The validity of this sale constituted one of the questions in the cause, it being asserted on one side and denied on the other, that previous to the advertisement of the sale, he had not taken the oath prescribed by law, and indispensable to the validity of such a sale. Luther Richardson entered into possession of the premises, and had seisin thereof under and according to his deed; and on the 29th of September, 1824, mortgaged the same to Goodman, Saville & Kent, to secure the payment of $1229 70; and subsequently, on the 13th of August, 1824, gave them a second mortgage thereof, to secure the payment of $2850 30. Afterwards, the equity of redemption of Luther Richardson was attached, and subsequently, on the 18th of May, 1825, sold to John C. Proctor on an execution issued in favor of Mellen & Norcross against L. Richardson. While this attachment was pending, on the 14th of May, 1825, L. Richardson conveyed the premises by a deed of quitclaim, to his brother, Prentiss Richardson, for a consideration, stated in the deed to be $3000. On the 21st of May, 1825, Proctor conveyed his title, acquired under the levy or execution in the equity of redemption of the premises, to Joshua Bennett. On the 6th of May, 1826, in pursuance of a previous negotiation, Luther Richardson and his wife, and Prentiss Richardson, executed a deed of quitclaim of the premises to William W. Walker, and Albigence W. Fisher, for the consideration (as stated in the deed) of $2000; and on the same day, Walker and Fisher executed a bond for $10,000 to Luther Richardson alone, whereby, after reciting the quitclaim deed to themselves, the mortgages to Goodman, Saville & Kent, the sale of the equity of redemption to Proctor, and the conveyance by him to Bennett, the condition provides, that they shall re-

convey the premises to Luther Richardson whenever, within five years from the date, he shall pay, or cause to be paid to them, all such sums of money as they shall pay in discharge of the incumbrances aforesaid, with legal interest, together with such sums as they may expend in betterments and improvements on the premises in that time by the mutual consent of the parties. At the same time, Walker and Fisher executed to Luther Richardson a lease of a part of the premises for five years, upon the annual rent of one cent during the term, unless the premises should be previously redeemed according to the provisions of the bond. On the 19th of September, 1826, Walker and Fisher took an assignment of their several mortgage from Goodman, Saville & Kent, paying them therefor $3171 87; and subsequently, on the 14th of April, 1827, they took an assignment from the surviving partners, of the other mortgage to Goodman, Saville & Kent. On the 25th of May, 1826, Bennett conveyed to Walker and Fisher, by deed of quitclaim, for the sum of $1200 (as stated in the deed), all his right in the premises. So that, in virtue of all these conveyances, Walker and Fisher became the exclusive owners of the premises, subject only to the right of redemption of Luther Richardson under their bond to him, above referred to. Whether this right of redemption had been extinguished or not by the nonpayment of the moneys advanced by Walker and Fisher within the five years, according to the terms of the condition of the bond, was one of the matters in controversy between the parties.

On or before the 13th of May, 1831, it seems, that a claim was set up, by the minor children of Samuel Frye, to the premises, grounded, as has been already suggested, upon the supposed invalidity of the guardianship sale thereof in June, 1823. A negotiation then took place between Luther Richardson on one side, and Flagg (the plaintiff) and Mann (the defendant) on the other side, the object of which was (as the bill asserts), for Flagg and Mann jointly to purchase of L. Richardson his title

(such as it was) in the premises (the five years being expired), and also to extinguish the claims of Walker and Fisher and of the Frye heirs in the premises on their equal and joint account. The bill asserts, that Flagg and Mann agreed with each other, that the purchase should be made at their mutual expense, and for their mutual benefit; and also agreed with Luther Richardson, upon his conveying his title in the premises to them, in case the title under the guardianship deed, and under the other conveyances, above referred to, should be found good, so that they might hold the same, to pay the sums due to Walker and Fisher, and also to pay him such part of the sum of $9000, as should remain after discharging the debts so due to Walker and Fisher. The bill further asserts, that in pursuance of this agreement, Flagg and Mann, on the 13th of May, 1831, received a conveyance of the premises, by deed of quitclaim, from Luther Richardson, with a special warranty against himself and all persons claiming under him; and that they, Flagg and Mann, made a certain promissory note, payable to Luther Richardson, for the sum of $3500, and which was delivered to one Seth Ames, the counsel of Richardson, to hold for his use in case Flagg and Mann should fail to comply with their agreement; and the better to secure the performance thereof. Though this quitclaim of L. Richardson to Flagg and Mann is admitted to have been formally executed, yet it is denied, by the answer, that it ever became a consummated conveyance between the parties. On the contrary, it is insisted, that it was afterwards wholly abandoned upon facts subsequently ascertained. The agreement also, as stated in the bill, is denied, as to any purchase from the Frye heirs, and as to any engagement to pay the debt due to Walker and Fisher.

On the 27th of July, 1831, Walker and Fisher conveyed their title in the premises to Mann by a quitclaim deed, for the asserted sum of $10,000. The bill charges, that this deed ought to have been made in the names of Flagg and Mann, in pursu-

ance of the agreement stated in the bill, and was fraudulently and secretly taken in the name of Mann alone. This is positively denied in the answer.

On the 28th of July, 1831, Samuel F. Frye and Aaron P. Frye (two of the Frye heirs) conveyed, by a quitclaim deed, all their title in the premises to the defendant Adams. On the 2d of August of the same year, Herman A. Frye and his wife, Mary Frye (she being one of the female heirs), in like manner conveyed her title to Adams; and on the 4th of the same month, the remaining heirs, viz. Joseph Huse, and Harriot his wife (one of the female heirs), and Caroline Frye and Adeline Frye, the other female heirs, in like manner conveyed their title to Adams; so that Adams thereby became possessed (so far as by law he might) of the title of all the Frye children in the premises. The bill charges, that these purchases were secretly made by a fraudulent agreement between Mann and Adams, the latter being fully acquainted with the agreement between the plaintiffs Flagg and Mann for their mutual benefit, with an intent to defraud the plaintiff. The answer wholly denies the charge.

On the 6th of August, in the same year (1831), Adams conveyed, by a quitclaim deed, one moiety of the premises, and of all his right and title therein, to Mann; and Mann, on the same day, executed a counter conveyance of all his title to the other moiety to Adams.

On the 8th of the same month, Mann conveyed, by a quitclaim deed, his moiety of the premises to the defendant, Fuller, for $40,000 (as stated in the deed), and Fuller, on the same day, executed a mortgage deed of the same moiety to Mann, as security for the payment of four notes (each for $10,000), given for the purchase money. The bill charges Fuller with a full knowledge of all the facts at the time of his purchase.

Such is a general outline of the most material facts, which are necessary to a true understanding of the nature and objects of the bill. The prayer of the bill is, that the deeds of Mann to

Adams, and of Mann to Fuller, and all other the conveyances of Mann, may be declared void as made in fraud of the rights of the plaintiff; and that upon payment by the plaintiff of one moiety of the moneys paid to redeem the incumbrances on the property, and in extinguishing the claims of the Frye heirs, and perfecting the title to the premises, Mann, Adams, and Fuller may be decreed to convey one moiety of the premises to the plaintiff; or if that cannot be done by reason of any conveyance to *bonâ fide* purchasers without notice, that Mann and his confederates (Adams and Fuller) may be decreed to make full compensation for such moiety, or so much thereof as cannot be conveyed, to him; and that such parts of the purchase money as has not been paid, and all securities therefor, may be decreed to be paid and assigned to the plaintiff, until he is indemnified; and then follows a prayer for general relief.

Answers were severally put in by Mann, Adams, and Fuller, to which the plaintiff made the general replication. The proofs, consisting of depositions and exhibits in the case, extended to great length. The foregoing outline, together with the summary of the statements and denials in the several pleadings, which is presented in the opinion of the Court, will be sufficient for a clear understanding of the case.

A bill against the same parties, and founded on the foregoing facts, had been instituted before the Supreme Judicial Court of Massachusetts, but finally dismissed for want of jurisdiction (S. C. 14 Pick. R. 467). The present bill was filed at the October term of this Court, 1833. And the cause has been continued until the present term.

For the complainant, *B. Rand* and *C. G. Loring*. For the defendants Mann and Adams, *J. Mason* and *F. Dexter*; for the defendant Fuller, *S. Greenleaf* and *W. R. P. Washburn*.

The ample discussion, in the opinion of the Court, of all the points raised at the bar, will render it superfluous, even if it could be done within reasonable space, to present a full view of the

very learned and able arguments of counsel. The naked points, taken by the respective parties, were as follow:

For the *plaintiff* it was contended,

1*st*. That Luther Richardson, by virtue of the deeds executed by Samuel Frye as guardian of the minor children of his wife Polly Frye, of the lands in question, and his entry thereupon, became seized as owner thereof in fee.

2*d*. That the contract made between Luther Richardson and Walker and Fisher, and the deed from him and Prentiss Richardson to them, and their bond to him, constituted an equitable mortgage, which a Court of Equity will recognise and enforce; so that the sums of money advanced by them in procuring an assignment of the mortgages which he had made to Goodman, Saville & Kent, and the release or conveyance of the equity of redemption from Bennett, were in the nature of incumbrances from which Luther Richardson had a right to redeem the land as mortgagor, when he executed his deed to the complainant and the said Mann. And that, therefore, the said deed was a conveyance to them by him of a legal or equitable right of redemption in these lands.

3*d*. That at the time of the execution of the deed of Luther Richardson to the complainant and the said Mann, the said Richardson had such an equitable or legal right, in the lands in question, as would, according to the principles upon which this Court exercises its authority to compel specific performance, have enabled him to compel Walker and Fisher to reconvey to him the lands, upon tender of payment of their advances, interest, &c. And that this right passed to the complainant and Mann, under the said deed.

4*th*. That by the deed from Luther Richardson to the complainant and Mann under their contract with each other, to obtain the title to these lands for their mutual benefit, they jointly obtained such a title or color of title, as made any purchase by either of them, of any adverse claim or title, to enure

to the benefit of both; upon the well-established principle of equity, that where two persons are in possession of an imperfect title, the purchase of an adverse claim enures to their joint benefit.

5*th*. That the principle last stated, is an entire answer to any defence on the ground, that Luther Richardson had not acquired a good title under the guardian's deed, inasmuch as he had thereby color of title, and having entered, had actual seisin.

6*th*. That the deed from Luther Richardson to the complainant and Mann, was absolutely delivered.

7*th*. That if such delivery to the grantees, were or could have been conditional, nevertheless an inchoate title, or color of title, or imperfect right was thereby created in the complainant and Mann jointly, which neither could secretly abandon, and which would cause any subsequent acquisition of an adverse title by either, to enure for the benefit of both.

8*th*. That at the time of the purchase of the release, from Walker and Fisher to the said Mann, and of the releases of the minor heirs to the said Adams, and the other acts done by Mann and Adams to perfect the title to these lands; the said Mann fraudulently concealed these proceedings from the complainant, and deceived him into the belief, that he, the said Mann, was endeavoring to perfect the title for his and the complainant's mutual benefit. And, that the proceedings of the said Mann in the premises, were a fraud upon the complainant as a co-tenant with him of the right in equity to redeem, or as jointly interested with him in the right to compel a specific performance, or as having with him an inchoate or imperfect title, to be perfected for their mutual benefit, according to their contract.

9*th*. That the said John M. Adams and Elisha Fuller had actual and constructive notice of the contract between the complainant and the said Mann, and of the complainant's rights and interests in and to said lands, and to the benefit of any purchases made by the said Mann, or of any releases obtained by him of

any adverse titles thereto; and therefore, they became parties to the fraud practised by said Mann, and cannot lawfully set up any claims or titles adverse to those asserted by the complainant.

10*th*. That the complainant is entitled to have a moiety of the said lands, or of such part thereof, as may not have been sold to *bonâ fide* purchasers without notice, released or conveyed to him and to have the securities received on any such sales or his proportional part thereof delivered over to him, and to be indemnified for any losses he may have sustained, by reason of being prevented by the acts of the defendants from the possession and employment of these lands; he having been at all times ready to pay his proportional part of the expenses of perfecting the title, and having required of the said Mann an account thereof, that he might seasonably make such payments.

The *defence of Mann and Adams* was rested on the following grounds:

1*st*. That Luther Richardson never derived any valid title to the premises, by reason of the want of the proper oath having been taken by Samuel Frye the guardian of the heirs of Polly Frye, before he fixed on the time and place of sale.

2*d*. That the deed from Prentiss and Luther Richardson, to Fisher and Walker, did not, together with their bond to Luther, constitute a mortgage legal or equitable, but that the bond was a mere personal obligation; so that after the expiration of the five years, Luther had no title or right to the land legal or equitable, which did or could pass to Flagg and Mann, by Luther's deed to them.

3*d*. That the deed from Luther to Flagg and Mann, never was delivered to them as his deed, nor accepted by them as such, but that the agreement of Flagg and Mann to purchase of Luther was conditional, dependent upon his having a good title, and one which should be satisfactory to them.

4*th*. That by reason of the matters stated in the last two points, Flagg and Mann never had any joint or common interest

in the land, nor any such color of title thereto, as would give Flagg any right to claim any benefit from Mann's subsequent purchase of Fisher and Walker, or the heirs of Polly Frye.

5*th*. That there was no agreement between Flagg and Mann, to perfect the title to the said lands, or to do any thing further than to purchase Luther's title if he had any, and that it appearing that he had no title, that agreement was at an end before Mann's purchase of Walker and Fisher and of the Frye heirs.

6*th*. That both Flagg and Mann had abandoned the attempt and expectation of obtaining any title through Luther before Mann's purchase of Walker and Fisher or of the Fryes.

7*th*. That the attempt to obtain a title through Luther having failed and been abandoned, Mann had a perfect right to act for himself alone, in any new attempt to procure a title to said lands from any other persons.

8*th*. That Mann never did pretend to Flagg, that he was acting for or with him in the premises, after the return of Goodhue from Vermont, nor was ever guilty of any fraudulent concealment or practice towards the plaintiff.

9*th*. That the plaintiff never paid any thing for Luther's deed, nor paid nor offered to pay any part of the money paid by Mann for the purchase of the title of the said Walker and Fisher, and the Frye heirs, though the amount so paid by Mann was stated to him at his request.

10*th*. That Adams had no notice, actual or constructive, of any of the matters charged against Mann, until after he had taken a conveyance *bonâ fide*, and for a valuable consideration of half of the land.

11*th*. That the plaintiff is entitled to no relief; but that if he be, he can only have it upon payment to the party or parties against whom it shall be decreed, of one half of all the cost and expense of obtaining the said titles of Walker and Fisher and the Frye heirs and interest from the times of payment.

The *defendant Fuller*, adopted the grounds assumed by the

defendants Mann and Adams, so far as they were applicable to his defence, and stated the following in addition :—

1*st*. That Fuller is a *bonâ fide* purchaser of half of the lands, described in the plaintiff's bill, for a valuable consideration, without notice, positive or constructive, of any claim to, or interest therein on the part of the plaintiff, and, as such purchaser, is entitled to the protection and favor of this Court.

2*d*. That the plaintiff is a volunteer, has paid no consideration, and is without right, as against Fuller, in Law or in Equity.

3*d*. That the bill on its face is not sufficient to entitle the plaintiff to a decree against Fuller.

4*th*. That Luther Richardson, at the date of his alleged deed to Mann, and the plaintiff, had no claim to, or interest in the lands in question; and if it were otherwise, Fuller had no notice thereof at the time of his purchase, nor can his title be prejudiced by any thing which has taken place since; nor can vague rumor or even common report, as to the claim of Luther Richardson or the plaintiff, affect Fuller's title, which is supported by the registered deed of Luther Richardson, in contradiction of such rumor and report.

5*th*. That the transactions alleged to have taken place between Fisher and Walker, and Luther Richardson and Prentiss Richardson, in relation to the conveyance of the lands in question to the said Walker and Fisher, did not give to Luther a right to redeem the said premises as a mortgagor, on the 13th of May, 1831, the date of his alleged deed to Mann and the plaintiff, according to the doctrine of the English Court of Chancery, much less had the said Luther any such right under the Statutes of Massachusetts, or according to the adjudged cases in Massachusetts, and against the policy of the registry acts thereof.

6*th*. That if the plaintiff acquired any interest in the lands from the deed of Luther Richardson, Mann did not convey it to Fuller, he only conveyed to him such an interest as he had, nor does his deed purport to convey any more.

7*th*. That as the conveyances from Walker and Fisher and the Fryes were to Mann alone, he had authority to sell in his own name the interest which he thereby acquired, and Fuller is not responsible for the application of the proceeds; and if the plaintiff has any claim, it is not to the land, but to a share of the proceeds or profits, and against Mann, or Mann and Adams.

8*th*. That Fuller having derived all Mann's interest in the premises, prior to the time of the alleged tender of the money, the tender should have been made to him, if to any one, and not to Mann.

9*th*. That if the plaintiff had any equity against Mann and Adams or either of them, it was so doubtful, that even if Fuller had had notice thereof, which he positively denies, he was not bound to regard it.

10*th*. That notice of nothing alleged against Fuller but actual fraud on the part of Mann against the plaintiff, and actual co-operation therein on his, Fuller's part, can affect his title to the lands in question.

11*th*. That, upon the plaintiff's *own* account of the matter, and *if there was* any agreement between him and Mann, it appears to have been an agreement, that Mann should purchase lands at their joint expense, the plaintiff to furnish half the funds, and the land to be sold again, for profit; That the plaintiff advanced no money, and there was no evidence of the agreement, by means of which Mann could compel the plaintiff to execute it; That Mann, therefore, was justifiable in taking the title to himself, both for his own protection and to enable him to make sales; That being thus, *at most*, but a trustee with power to sell, Fuller's title derived from Mann is good, he is not bound to see to the application of the money, and the plaintiff's remedy, if any, is merely personal, and against Mann alone.

Story J. This is the case of a suit in Equity, and has been argued with great ability and learning on the merits by the

counsel on all sides, at the hearing at the present term. The facts are very complicated, the documents very voluminous, and the evidence in various parts in direct conflict. The questions of law, too, involved in the cause, are not a few, and some of them not without difficulty or novelty in their actual application to the circumstances of the cause. I have, therefore, taken time to consider and examine the record; and I shall now proceed to deliver my judgment.

It is obvious, that the whole right of the plaintiff (Flagg), to maintain the present bill rests essentially upon the truth of the allegations in the bill as to the agreement between Mann and himself on or before the 13th of May, 1831, to purchase the premises at their mutual expense and for their mutual benefit, and to perfect the title thereto, and to extinguish the claims (if any) of the Frye heirs, and also the claims of Walker and Fisher. If the agreement was never made, in substance, as it is alleged; or having been made, if it was never afterwards carried into effect by the parties, but was definitively abandoned; then the whole foundation of the plaintiff's case is gone, without mooting any other of the questions raised in the cause. If, on the other hand, that agreement is established, and is a subsisting agreement, then the other questions in the cause must necessarily be discussed and disposed of.

In the natural order of the questions, it seems proper in the first place to ascertain, whether any such agreement was made, as is stated in the bill; and if so, whether it has been abandoned.

The agreement between Flagg and Mann, as stated in the bill, consists of four distinct parts. (1.) To purchase and procure for themselves for their mutual and equal benefit, and at their mutual and equal expense, a complete and perfect title to the premises. For this purpose, (2.) to purchase of Luther Richardson his title to the premises, giving him therefor, if his title should be found to be good and sufficient to enable them to

hold the same, the sum of $9000, subject, however, to the deduction of the amount of the subsisting incumbrances thereon. (3.) To extinguish the real or pretended title of the Frye heirs to the premises; and (4.) To pay the sums due to Walker and Fisher, as subsisting incumbrances thereon. There is also a charge in the bill, that the deed was procured from Luther Richardson, in pursuance of the agreement.

The defendant, Mann, by his answer denies, that there ever was any agreement made between him and the plaintiff to procure for their common benefit a perfect title. But in reference thereto he says, that on the 13th of May, 1831, Flagg, and himself, understanding that Luther Richardson claimed an equity of redemption in the premises in virtue of the obligation of Walker and Fisher, notwithstanding the expiration of the five years, and believing the amount due to Walker and Fisher to be about $6000 only, and knowing the claim of the Frye heirs, but not knowing or having heard, that Luther Richardson had, before the conveyance to Walker and Fisher, made a conveyance of the premises to Prentiss Richardson, and not knowing or ever having heard, that Samuel Frye, the guardian, had not, before fixing the time and place of sale, taken the oath prescribed by law; but supposing the claim of the Frye heirs to be founded on the want of the notifications of the said sale being duly posted, did verbally agree with each other to offer, and did offer to Luther Richardson, to purchase of him his right and title in the premises, and to give him for the same, when clear of incumbrances, if they should be satisfied with his title, the sum of $9000, provided a good and clear title were made to them within three years from that time; which offer was accepted and agreed to by him (Luther Richardson). In pursuance of the offer and acceptance Luther Richardson made the quitclaim to them (Mann and Flagg), but did not deliver the same, nor was the same accepted by them as his deed, the said contract being still conditional and incomplete, and his

(Luther Richardson's) wife, not having signed the deed, as it was agreed she should. But the deed was left at Mann's office to be afterwards completed and delivered, or withdrawn by Luther according to the election of Mann and Flagg. The deed was not recorded until the 15th of February, 1832, at which time it was procured to be recorded by Flagg, without the knowledge or assent of Mann.

Mann by his answer further denies, that he and the plaintiff ever agreed with Luther Richardson to pay to Walker and Fisher any sum or sums of money whatever. But he admits, that he and the plaintiff did make their note for $3,500, payable to Luther Richardson, and delivered the same to Ames, to remain in his hands, until they had examined the records of deeds and of probate, and had taken the advice of Samuel Hoar, Esq. respecting Luther Richardson's title to the premises. And if, after such execution, Mann and Flagg should elect to proceed with the negotiation, then the note was to be given up to them, and they were to give their obligation to Luther Richardson, to pay the sum of $9000, whenever he should within three months make to them a good title to the premises free from all incumbrances; otherwise the note and deed were to be given up and the negotiation to be wholly abandoned. Mann has annexed to his answer a copy of the form of the obligation, which, he says was drafted by him, and approved by Luther Richardson, to be given in case Mann and Flagg elected to proceed with the negotiation.

Mann further in his answer states, that he received Mr. Hoar's opinion, a copy of which is annexed to the answer, and is unfavorable to the title of Luther Richardson to redeem Walker and Fisher after the lapse of the five years. He showed it to the plaintiff; and he afterwards examined the records of deeds and of probate; and there on the 17th of May, 1831, he first ascertained, that a conveyance had been made by Luther Richardson to Prentiss Richardson before the deed to Walker and

hold the same, the sum of $9000, su[illegible] cords, duction of the amount of the subsis[illegible] sale, (3.) To extinguish the real or pre[illegible] hat he to the premises; and (4.) To [illegible] vised by Fisher, as subsisting incumbr[illegible] want of such charge in the bill, that the de[illegible] n the opinion of ardson, in pursuance of th[illegible] and Mann agreed to

The defendant, Mann. [illegible] ardson, and did wholly was any agreement ma[illegible] after he, Mann, gave notice cure for their commor[illegible] also notice to Ames, that the thereto he says, that [illegible]

self, understanding, [illegible] his answer, that after the 17th of May redemption in th[illegible] ded or affected to co-operate, or gave and Fisher, no[illegible] or believe, that he would co-operate with believing the[illegible] asures to extinguish the claim of Walker and $6000 only [illegible] e Frye heirs, or to perfect the title to the prem- knowing o[illegible] bill is alleged. He admits, however, that after the the conv[illegible] with Luther Richardson was so ended, he and Flagg the pre[illegible] omas P. Goodhue, employed one Stephen Goodhue, as havin[illegible] agent, to go to Vermont, for their common benefit, to obtain fixin[illegible] reyances of the claims of the Frye heirs; but he wholly lav[illegible] led to accomplish the object, and the attempt was abandoned; o[illegible] nd with this, he insists, that all contract and agreement between himself and Flagg, respecting the premises, were at an end.

Such are the statements and denials of the answer in reference to the matter of the agreement between Flagg and Mann, charged in the bill; and so far as they are responsive to the matters charged in the bill, they are of course proper evidence in favor of Mann. The answer admits an agreement to purchase the title of Luther Richardson; but it insists, that it was a conditional purchase to be affected by future inquiries and events. In this respect it is not materially at variance with the allegations of the bill. The matters, which it controverts, are; 1. That there was any absolute delivery of the deed by Luther Richardson to

e agreement; 2. That there was
t to pay Walker and Fisher's
ipulation in that agreement
f the Frye heirs for the
agg. 4. It sets up a positive
with Luther Richardson by the
positive an abandonment of a subse-
lagg for the purchase of the claims of
et us consider these points in their order.
onal delivery of the deed by Luther Richard-
execution of the deed being admitted, and the deed
the possession of Mann, and the allegation of a condi-
l delivery not being responsive to the charge in the bill, the
nswer is not evidence of it; but the *onus probandi* is on Mann
to establish it. The suggestion is that the deed of Luther
Richardson was imperfect; that it was to be executed by his
wife, who was to release her dower; and that it was left in
Mann's office as an imperfect instrument, until this was accom-
plished. Upon the face of the deed it was certainly contem-
plated, that it was to be signed by the wife. But this would not
necessarily establish, that it was an essential ingredient, before it
should have effect as to the husband, or that there was not a
subsequent waiver of her signature. The case in support of the
answer mainly rests on the testimony of John W. Coolidge,
who was a student in Mann's office, and who states, that he was
present on the 13th of May, 1831, and heard the agreement
between Mann and Flagg, and Luther Richardson, who, with
Ames, were all present in Mann's office. The papers, then
produced and before the parties, were a deed from Luther Rich-
ardson, a bond from Walker and Fisher, with an assignment
written thereon, to Flagg and Mann, and a note from them to
Luther Richardson. The note was delivered to Ames, not to
be delivered to Richardson, or to any other person, without the
order of Flagg or Mann; and the deed, bond and assignment

Fisher; and also that it did not appear on the probate records, that Samuel Frye had, before fixing the time and place of sale, taken the oath prescribed by law in such cases; and that he and Flagg were, on the 18th of the same month, advised by Isaac Fiske, Esq. whom they consulted, that the want of such an oath was a fatal defect in the title. Upon the opinion of Mr. Hoar and Mr. Fiske so given, Flagg and Mann agreed to abandon the negotiation with Luther Richardson, and did wholly abandon the same; and a few days after he, Mann, gave notice thereof to Luther Richardson, and also notice to Ames, that the note was to be given up.

Mann further denies by his answer, that after the 17th of May aforesaid he ever pretended or affected to co-operate, or gave Flagg to understand or believe, that he would co-operate with the plaintiff in measures to extinguish the claim of Walker and Fisher, or of the Frye heirs, or to perfect the title to the premises, as in the bill is alleged. He admits, however, that after the negotiation with Luther Richardson was so ended, he and Flagg and Thomas P. Goodhue, employed one Stephen Goodhue, as their agent, to go to Vermont, for their common benefit, to obtain conveyances of the claims of the Frye heirs; but he wholly failed to accomplish the object, and the attempt was abandoned; and with this, he insists, that all contract and agreement between himself and Flagg, respecting the premises, were at an end.

Such are the statements and denials of the answer in reference to the matter of the agreement between Flagg and Mann, charged in the bill; and so far as they are responsive to the matters charged in the bill, they are of course proper evidence in favor of Mann. The answer admits an agreement to purchase the title of Luther Richardson; but it insists, that it was a conditional purchase to be affected by future inquiries and events. In this respect it is not materially at variance with the allegations of the bill. The matters, which it controverts, are; 1. That there was any absolute delivery of the deed by Luther Richardson to

Flagg and himself under the agreement; 2. That there was any stipulation in that agreement to pay Walker and Fisher's demands; 3. That there was any stipulation in that agreement to buy in and extinguish the claim of the Frye heirs for the common benefit of Mann and Flagg. 4. It sets up a positive abandonment of the agreement with Luther Richardson by the consent of Flagg; and as positive an abandonment of a subsequent agreement with Flagg for the purchase of the claims of the Frye heirs. Let us consider these points in their order. 1. The conditional delivery of the deed by Luther Richardson. The execution of the deed being admitted, and the deed found in the possession of Mann, and the allegation of a conditional delivery not being responsive to the charge in the bill, the answer is not evidence of it; but the *onus probandi* is on Mann to establish it. The suggestion is that the deed of Luther Richardson was imperfect; that it was to be executed by his wife, who was to release her dower; and that it was left in Mann's office as an imperfect instrument, until this was accomplished. Upon the face of the deed it was certainly contemplated, that it was to be signed by the wife. But this would not necessarily establish, that it was an essential ingredient, before it should have effect as to the husband, or that there was not a subsequent waiver of her signature. The case in support of the answer mainly rests on the testimony of John W. Coolidge, who was a student in Mann's office, and who states, that he was present on the 13th of May, 1831, and heard the agreement between Mann and Flagg, and Luther Richardson, who, with Ames, were all present in Mann's office. The papers, then produced and before the parties, were a deed from Luther Richardson, a bond from Walker and Fisher, with an assignment written thereon, to Flagg and Mann, and a note from them to Luther Richardson. The note was delivered to Ames, not to be delivered to Richardson, or to any other person, without the order of Flagg or Mann; and the deed, bond and assignment

Fisher; and also that it did not appear on the probate records, that Samuel Frye had, before fixing the time and place of sale, taken the oath prescribed by law in such cases; and that he and Flagg were, on the 18th of the same month, advised by Isaac Fiske, Esq. whom they consulted, that the want of such an oath was a fatal defect in the title. Upon the opinion of Mr. Hoar and Mr. Fiske so given, Flagg and Mann agreed to abandon the negotiation with Luther Richardson, and did wholly abandon the same; and a few days after he, Mann, gave notice thereof to Luther Richardson, and also notice to Ames, that the note was to be given up.

Mann further denies by his answer, that after the 17th of May aforesaid he ever pretended or affected to co-operate, or gave Flagg to understand or believe, that he would co-operate with the plaintiff in measures to extinguish the claim of Walker and Fisher, or of the Frye heirs, or to perfect the title to the premises, as in the bill is alleged. He admits, however, that after the negotiation with Luther Richardson was so ended, he and Flagg and Thomas P. Goodhue, employed one Stephen Goodhue, as their agent, to go to Vermont, for their common benefit, to obtain conveyances of the claims of the Frye heirs; but he wholly failed to accomplish the object, and the attempt was abandoned; and with this, he insists, that all contract and agreement between himself and Flagg, respecting the premises, were at an end.

Such are the statements and denials of the answer in reference to the matter of the agreement between Flagg and Mann, charged in the bill; and so far as they are responsive to the matters charged in the bill, they are of course proper evidence in favor of Mann. The answer admits an agreement to purchase the title of Luther Richardson; but it insists, that it was a conditional purchase to be affected by future inquiries and events. In this respect it is not materially at variance with the allegations of the bill. The matters, which it controverts, are; 1. That there was any absolute delivery of the deed by Luther Richardson to

Flagg and himself under the agreement; 2. That there was any stipulation in that agreement to pay Walker and Fisher's demands; 3. That there was any stipulation in that agreement to buy in and extinguish the claim of the Frye heirs for the common benefit of Mann and Flagg. 4. It sets up a positive abandonment of the agreement with Luther Richardson by the consent of Flagg; and as positive an abandonment of a subsequent agreement with Flagg for the purchase of the claims of the Frye heirs. Let us consider these points in their order. 1. The conditional delivery of the deed by Luther Richardson. The execution of the deed being admitted, and the deed found in the possession of Mann, and the allegation of a conditional delivery not being responsive to the charge in the bill, the answer is not evidence of it; but the *onus probandi* is on Mann to establish it. The suggestion is that the deed of Luther Richardson was imperfect; that it was to be executed by his wife, who was to release her dower; and that it was left in Mann's office as an imperfect instrument, until this was accomplished. Upon the face of the deed it was certainly contemplated, that it was to be signed by the wife. But this would not necessarily establish, that it was an essential ingredient, before it should have effect as to the husband, or that there was not a subsequent waiver of her signature. The case in support of the answer mainly rests on the testimony of John W. Coolidge, who was a student in Mann's office, and who states, that he was present on the 13th of May, 1831, and heard the agreement between Mann and Flagg, and Luther Richardson, who, with Ames, were all present in Mann's office. The papers, then produced and before the parties, were a deed from Luther Richardson, a bond from Walker and Fisher, with an assignment written thereon, to Flagg and Mann, and a note from them to Luther Richardson. The note was delivered to Ames, not to be delivered to Richardson, or to any other person, without the order of Flagg or Mann; and the deed, bond and assignment

Fisher; and also that it did not appear on the probate records, that Samuel Frye had, before fixing the time and place of sale, taken the oath prescribed by law in such cases; and that he and Flagg were, on the 18th of the same month, advised by Isaac Fiske, Esq. whom they consulted, that the want of such an oath was a fatal defect in the title. Upon the opinion of Mr. Hoar and Mr. Fiske so given, Flagg and Mann agreed to abandon the negotiation with Luther Richardson, and did wholly abandon the same; and a few days after he, Mann, gave notice thereof to Luther Richardson, and also notice to Ames, that the note was to be given up.

Mann further denies by his answer, that after the 17th of May aforesaid he ever pretended or affected to co-operate, or gave Flagg to understand or believe, that he would co-operate with the plaintiff in measures to extinguish the claim of Walker and Fisher, or of the Frye heirs, or to perfect the title to the premises, as in the bill is alleged. He admits, however, that after the negotiation with Luther Richardson was so ended, he and Flagg and Thomas P. Goodhue, employed one Stephen Goodhue, as their agent, to go to Vermont, for their common benefit, to obtain conveyances of the claims of the Frye heirs; but he wholly failed to accomplish the object, and the attempt was abandoned; and with this, he insists, that all contract and agreement between himself and Flagg, respecting the premises, were at an end.

Such are the statements and denials of the answer in reference to the matter of the agreement between Flagg and Mann, charged in the bill; and so far as they are responsive to the matters charged in the bill, they are of course proper evidence in favor of Mann. The answer admits an agreement to purchase the title of Luther Richardson; but it insists, that it was a conditional purchase to be affected by future inquiries and events. In this respect it is not materially at variance with the allegations of the bill. The matters, which it controverts, are; 1. That there was any absolute delivery of the deed by Luther Richardson to

Flagg and himself under the agreement; 2. That there was any stipulation in that agreement to pay Walker and Fisher's demands; 3. That there was any stipulation in that agreement to buy in and extinguish the claim of the Frye heirs for the common benefit of Mann and Flagg. 4. It sets up a positive abandonment of the agreement with Luther Richardson by the consent of Flagg; and as positive an abandonment of a subsequent agreement with Flagg for the purchase of the claims of the Frye heirs. Let us consider these points in their order. 1. The conditional delivery of the deed by Luther Richardson. The execution of the deed being admitted, and the deed found in the possession of Mann, and the allegation of a conditional delivery not being responsive to the charge in the bill, the answer is not evidence of it; but the *onus probandi* is on Mann to establish it. The suggestion is that the deed of Luther Richardson was imperfect; that it was to be executed by his wife, who was to release her dower; and that it was left in Mann's office as an imperfect instrument, until this was accomplished. Upon the face of the deed it was certainly contemplated, that it was to be signed by the wife. But this would not necessarily establish, that it was an essential ingredient, before it should have effect as to the husband, or that there was not a subsequent waiver of her signature. The case in support of the answer mainly rests on the testimony of John W. Coolidge, who was a student in Mann's office, and who states, that he was present on the 13th of May, 1831, and heard the agreement between Mann and Flagg, and Luther Richardson, who, with Ames, were all present in Mann's office. The papers, then produced and before the parties, were a deed from Luther Richardson, a bond from Walker and Fisher, with an assignment written thereon, to Flagg and Mann, and a note from them to Luther Richardson. The note was delivered to Ames, not to be delivered to Richardson, or to any other person, without the order of Flagg or Mann; and the deed, bond and assignment

Fisher; and also that it did not appear on the probate records, that Samuel Frye had, before fixing the time and place of sale, taken the oath prescribed by law in such cases; and that he and Flagg were, on the 18th of the same month, advised by Isaac Fiske, Esq. whom they consulted, that the want of such an oath was a fatal defect in the title. Upon the opinion of Mr. Hoar and Mr. Fiske so given, Flagg and Mann agreed to abandon the negotiation with Luther Richardson, and did wholly abandon the same; and a few days after he, Mann, gave notice thereof to Luther Richardson, and also notice to Ames, that the note was to be given up.

Mann further denies by his answer, that after the 17th of May aforesaid he ever pretended or affected to co-operate, or gave Flagg to understand or believe, that he would co-operate with the plaintiff in measures to extinguish the claim of Walker and Fisher, or of the Frye heirs, or to perfect the title to the premises, as in the bill is alleged. He admits, however, that after the negotiation with Luther Richardson was so ended, he and Flagg and Thomas P. Goodhue, employed one Stephen Goodhue, as their agent, to go to Vermont, for their common benefit, to obtain conveyances of the claims of the Frye heirs; but he wholly failed to accomplish the object, and the attempt was abandoned; and with this, he insists, that all contract and agreement between himself and Flagg, respecting the premises, were at an end.

Such are the statements and denials of the answer in reference to the matter of the agreement between Flagg and Mann, charged in the bill; and so far as they are responsive to the matters charged in the bill, they are of course proper evidence in favor of Mann. The answer admits an agreement to purchase the title of Luther Richardson; but it insists, that it was a conditional purchase to be affected by future inquiries and events. In this respect it is not materially at variance with the allegations of the bill. The matters, which it controverts, are; 1. That there was any absolute delivery of the deed by Luther Richardson to

Flagg and himself under the agreement; 2. That there was any stipulation in that agreement to pay Walker and Fisher's demands; 3. That there was any stipulation in that agreement to buy in and extinguish the claim of the Frye heirs for the common benefit of Mann and Flagg. 4. It sets up a positive abandonment of the agreement with Luther Richardson by the consent of Flagg; and as positive an abandonment of a subsequent agreement with Flagg for the purchase of the claims of the Frye heirs. Let us consider these points in their order. 1. The conditional delivery of the deed by Luther Richardson. The execution of the deed being admitted, and the deed found in the possession of Mann, and the allegation of a conditional delivery not being responsive to the charge in the bill, the answer is not evidence of it; but the *onus probandi* is on Mann to establish it. The suggestion is that the deed of Luther Richardson was imperfect; that it was to be executed by his wife, who was to release her dower; and that it was left in Mann's office as an imperfect instrument, until this was accomplished. Upon the face of the deed it was certainly contemplated, that it was to be signed by the wife. But this would not necessarily establish, that it was an essential ingredient, before it should have effect as to the husband, or that there was not a subsequent waiver of her signature. The case in support of the answer mainly rests on the testimony of John W. Coolidge, who was a student in Mann's office, and who states, that he was present on the 13th of May, 1831, and heard the agreement between Mann and Flagg, and Luther Richardson, who, with Ames, were all present in Mann's office. The papers, then produced and before the parties, were a deed from Luther Richardson, a bond from Walker and Fisher, with an assignment written thereon, to Flagg and Mann, and a note from them to Luther Richardson. The note was delivered to Ames, not to be delivered to Richardson, or to any other person, without the order of Flagg or Mann; and the deed, bond and assignment

Fisher; and also that it did not appear on the probate records, that Samuel Frye had, before fixing the time and place of sale, taken the oath prescribed by law in such cases; and that he and Flagg were, on the 18th of the same month, advised by Isaac Fiske, Esq. whom they consulted, that the want of such an oath was a fatal defect in the title. Upon the opinion of Mr. Hoar and Mr. Fiske so given, Flagg and Mann agreed to abandon the negotiation with Luther Richardson, and did wholly abandon the same; and a few days after he, Mann, gave notice thereof to Luther Richardson, and also notice to Ames, that the note was to be given up.

Mann further denies by his answer, that after the 17th of May aforesaid he ever pretended or affected to co-operate, or gave Flagg to understand or believe, that he would co-operate with the plaintiff in measures to extinguish the claim of Walker and Fisher, or of the Frye heirs, or to perfect the title to the premises, as in the bill is alleged. He admits, however, that after the negotiation with Luther Richardson was so ended, he and Flagg and Thomas P. Goodhue, employed one Stephen Goodhue, as their agent, to go to Vermont, for their common benefit, to obtain conveyances of the claims of the Frye heirs; but he wholly failed to accomplish the object, and the attempt was abandoned; and with this, he insists, that all contract and agreement between himself and Flagg, respecting the premises, were at an end.

Such are the statements and denials of the answer in reference to the matter of the agreement between Flagg and Mann, charged in the bill; and so far as they are responsive to the matters charged in the bill, they are of course proper evidence in favor of Mann. The answer admits an agreement to purchase the title of Luther Richardson; but it insists, that it was a conditional purchase to be affected by future inquiries and events. In this respect it is not materially at variance with the allegations of the bill. The matters, which it controverts, are; 1. That there was any absolute delivery of the deed by Luther Richardson to

Flagg and himself under the agreement; 2. That there was any stipulation in that agreement to pay Walker and Fisher's demands; 3. That there was any stipulation in that agreement to buy in and extinguish the claim of the Frye heirs for the common benefit of Mann and Flagg. 4. It sets up a positive abandonment of the agreement with Luther Richardson by the consent of Flagg; and as positive an abandonment of a subsequent agreement with Flagg for the purchase of the claims of the Frye heirs. Let us consider these points in their order. 1. The conditional delivery of the deed by Luther Richardson. The execution of the deed being admitted, and the deed found in the possession of Mann, and the allegation of a conditional delivery not being responsive to the charge in the bill, the answer is not evidence of it; but the *onus probandi* is on Mann to establish it. The suggestion is that the deed of Luther Richardson was imperfect; that it was to be executed by his wife, who was to release her dower; and that it was left in Mann's office as an imperfect instrument, until this was accomplished. Upon the face of the deed it was certainly contemplated, that it was to be signed by the wife. But this would not necessarily establish, that it was an essential ingredient, before it should have effect as to the husband, or that there was not a subsequent waiver of her signature. The case in support of the answer mainly rests on the testimony of John W. Coolidge, who was a student in Mann's office, and who states, that he was present on the 13th of May, 1831, and heard the agreement between Mann and Flagg, and Luther Richardson, who, with Ames, were all present in Mann's office. The papers, then produced and before the parties, were a deed from Luther Richardson, a bond from Walker and Fisher, with an assignment written thereon, to Flagg and Mann, and a note from them to Luther Richardson. The note was delivered to Ames, not to be delivered to Richardson, or to any other person, without the order of Flagg or Mann; and the deed, bond and assignment

were left in the possession of Mann. He further states, that Mann and Flagg were to examine the records, and if they should conclude, after the examination and after consulting counsel, to retain the deed and assignment, they were to give a bond to Richardson, conditioned to pay him a certain sum, whenever his title should be adjudged good by the Supreme Court, and to take up their note lodged with Ames; and if, upon the examination, they concluded not to give their bond to Richardson, the deed and assignment were to be returned to the latter, and the note returned by Ames to them. He further states, that, a day or two after, a bond was partly prepared by Mann (the draft of which he verifies), in pursuance of the agreement, which Luther Richardson took away for examination. About the 22d of the same month of May he learned from Mann and Goodhue, that Mann had discovered the defect in the title of Luther Richardardson, from the want of taking the oath at the proper time before the guardianship sale. In November, 1831, he heard Mann ask Luther Richardson, how long it was, after the note was made and left with Ames, when he gave him notice, that his (Luther Richardson's) title was good for nothing, and that they should do nothing more, and requested him to call and take his papers. Richardson answered, it was about a fortnight. The witness farther states, that he understood from the parties, that Luther Richardson's wife was to sign the deed of her husband.

The draft of the bond referred to by the witness goes far to corroborate his testimony, as to some material facts. But it leaves the point now under consideration wholly untouched, for the draft is imperfect. There is nothing in it, which leads in the slightest degree to the conclusion, that the deed of Luther Richardson had not been delivered, or that the delivery was conditional.

Without in the slightest degree impeaching the integrity of the witness, there are circumstances in the case, which lead one to suspect, that there may be some errors in his testimony on

several points. Upon his cross-examination there is manifestly some hesitation and want of recollection as to circumstances connected with and included in his direct examination. But a more material circumstance, is that in his second deposition he qualifies his former deposition in several important particulars. His first deposition affirms and proceeds on the affirmation throughout, that he was not in the same room with the parties during all their negotiations and conversations; but that he was a part of the time in an adjoining room, and was called into the other room to witness the transactions. In his second deposition, taken about two years afterwards, he expresses a doubt, whether he was not in the same room with the parties during all the transactions.

There are, however, other intrinsic circumstances in the case, as well as other positive testimony, which do materially weaken the force of the conclusions to be drawn from Coolidge's testimony. In the first place, it is admitted, that, after the deed was executed by Richardson, it was left in Mann's office with Mann, and the note of Flagg and Man was delivered to Ames. It is difficult to reconcile these facts with the notion, that the transaction was not then treated as consummated between the parties; that the deed was not treated, as absolutely delivered by Richardson to Flagg and Mann, and the note delivered to Ames as an operative instrument, each of them being liable nevertheless to be rescinded by future events; that is, to speak technically, that both instruments were to be avoided by conditions subsequent, and were not dependent for their original validity upon conditions precedent not yet performed. Neither the deed, nor the note, have ever since been delivered up. The deed remains in Mann's possession and custody, and, so far as this fact goes, it affords a strong presumption of an actual delivery in conformity to the terms of the deed. It is common learning, that when a deed of grant is found in the possession of the grantee, it affords a just presumption of a due delivery thereof, because it then,

and not otherwise, would be in the proper custody. The answer in effect insists, that the instrument was never delivered as the deed of Richardson, but was a mere escrow. Now, there is a technical difficulty in this suggestion; for an instrument can never be delivered as an escrow to the grantee himself. Co. Litt. 36, *a*, is direct to this point. And though a Court of Equity will not govern itself exclusively by technical principles of this sort, where the intentions of the parties would be thereby defeated; yet there must be the clearest evidence in such a case, what that intention is, and whether it will be so defeated; otherwise the rule of law must prevail.

The testimony of Luther Richardson, the grantor, is on this point most important. An objection is made to his testimony upon the ground of his being an incompetent witness by reason of his interest in the event of this suit. But I profess myself unable to perceive, what interest, legal or equitable, he has in this suit. He may have a feeling, and undoubtedly has, in favor of the plaintiff. But nothing decided in this suit can be given in evidence in support of any claim on his part; for it is *res inter alios acta;* and he has, therefore, nothing to gain or to lose by it. Besides; he has been cross-examined by the defendant with a full knowledge of the objection; and after that it is difficult to say, that in a Court of Equity he can be heard to make the objection. According to Richardson's testimony there was an absolute delivery of the deed and the assignment of Walker and Fisher's bond to Flagg and Mann; for, he says in direct terms, that he assigned the bond to them, and at the same time he gave them a quitclaim deed of the premises. His statement of the agreement between them and himself is as follows: "After various conversations and stating, that a suit was pending instituted by Frye's heirs respecting the title (a fact, which is admitted on all sides to be true), I agreed to sell my right to them for $3500, which was to be paid to me in case my title proved good against Frye's heirs; and a note for this sum was

made by them, and deposited in the hands of Mr. Ames; and if the title of the Frye heirs prevailed and mine failed the note was to be given up." He adds, that by the terms of the agreement, Flagg and Mann were not to pay any thing, unless the transaction with Walker and Fisher and their bond to him should prove to be a mortgage. He denies, that Flagg and Mann had a right to rescind the contract, until the title should be proved bad by a trial at law. He says, that the bond was not to be given in exchange for the note, but was to be a bond explanatory of the terms of the agreement; and that the note was to remain in Ames's possession, until his title should be settled at law. He annexes a copy of the imperfect bond drawn up by Mann, and handed to him, which contains a part only of the recitals of that referred to by Coolidge. He says, that in June or July, 1831, Mann stated to him, that he doubted, whether the title was good for any thing; and about the 10th of August, 1831, Mann informed him, that he did not consider the title worth a quarter of a dollar, and he would have nothing more to do with it. About that time the witness called on Ames with Mann to exchange papers; but Flagg did not agree to it; and no exchange was ever made. He farther adds; "In regard to my title to the said bond, Flagg and Mann *were to perfect it at their own expense*. There was no time fixed, within which I was to make a good title, because they were to see to that. But I was not to be paid the money until the decision of a court of law establishing the title. There was nothing agreed upon relative to the term of three years." I observe, at present, that there is nothing in this deposition pointing to any agreement for the purchase of the claim of the Frye heirs between Flagg and Mann, and Richardson. But the only purchase apparently contemplated was the outstanding title in Walker and Fisher.

Ames's testimony as to the transaction is to this effect. That Mann stated, that he and Flagg had made a bargain with Luther Richardson, and were to buy his interest in that estate

and were to allow him the price, named in the quitclaim deed ($9,000) from Richardson to them, deducting therefrom such sum as should be found due from Richardson to Walker and Fisher, provided the title should prove good. Richardson did not know the exact sum due to Walker and Fisher; but he stated a sum as being due, which the witness thinks was about $5,500. Mann expressed a confidence, that the transaction between Richardson and Walker and Fisher was a mortgage. Mann was to examine the records at Cambridge, and find out, how much was due to Walker and Fisher. A note for $3,500, being the supposed balance, which was coming to Richardson, was drawn (the witness thinks by himself), and signed by Flagg and Mann, and deposited, for the time, with the witness. It was stated by Mann as the bargain of the parties, that when the amount due to Walker and Fisher was ascertained, that the note should be taken up, and Flagg and Mann's bond should be given to Richardson, conditioned to pay him the balance of the price of the land, provided the title proved good. Richardson, after some doubts, and consulting the witness, finally signed the deed, and the assignment of the bond of Walker and Fisher. The note was not negotiable. The deed and assignment were left on the table (in Mann's office), or taken by Flagg and Richardson for the purpose of having the deed acknowledged by Richardson. It was acknowledged on the same day, as the witness thinks, but is not positive. But when he last saw the deed and assignment on that day (the 13th of May) they were on the table in Mann's office. The next time he saw the deed was in August or September, 1831, when it was handed to him by Flagg. About the time when the information came out, that Mann and Adams had purchased the lands in question of the Frye heirs, Mann and Richardson came to the witness's office to take up the note. Richardson made no objection; and Mann took it away, and returned it again to the witness on the same day, saying, he had concluded to return it, or words to that

effect. It does not appear, that Flagg was, at the time, a party to these transactions. The witness adds, that in the latter part of the same month of May, Mann, under an injunction of secrecy, told him of a new and serious difficulty, the discovery, that the oath had not been properly taken by the guardian.

The testimony of Thomas P. Goodhue is, as far as it goes, confirmatory of that of Ames and Richardson on this point; and its bearing on other points will hereafter be the subject of comment. He says, that Mann told him, that he thought the transaction of Richardson with Walker and Fisher operated as a mortgage. That on or about the 18th of May, 1831, he was informed by Mann and Flagg, that they were the owners of the Richardson's title and interest in the premises, and that they were to pay $9,000, he thinks, in this way. They were to discharge the incumbrance of Walker and Fisher, and to pay the balance to Richardson. On the same day, he was also informed by them of the defect in Richardson's title from the omission of the guardian to take the oath at the prescribed time.

The testimony of another witness, Wood, is very cogent and positive. He says, that Mann told him, that he and Flagg had made the purchase of Richardson, and got their deed, and also an assignment of the bond or mortgage, and that they had agreed to give therefor $9,000. Mann took a paper from his drawer, and holding it up, said, this is our deed from Richardson, and we have given Richardson, for what is coming to him, our security for the same, and the security is deposited or put into the hands of Seth Ames. At another time, Mann inquired of the witness, whether Richardson's wife had signed the deed to Walker and Fisher; and Mann said, if she had, it was as well, as if she had signed the deed of her husband to Flagg and himself.

Now, upon this posture of the direct evidence bearing on this point, I confess, that I am reluctantly driven to the conclusion, that it is not satisfactory to establish, that the delivery of

Richardson's deed was not absolute, or that it was an imperfect inchoate transaction. Loose, and confidential, and inaccurate, as the whole proceedings were to attain the ends contemplated by the parties, I find no warrant in them to justify the Court in saying, that the deed of Richardson was never delivered as a deed, but merely as an escrow. The indirect evidence of the Goodhues, and of Hunt, as well as of some others of the witnesses, does not fortify this part of the case in favor of Mann. But, if it weighs at all, it corroborates the view taken on the other side, that Mann treated the deed, as complete in its delivery, however it might be subject to conditions subsequent. It has also been remarked, and the criticism is correct, that Mann, in his answer to the bill in the State Court, has not ventured positively to deny, that the deed was delivered, but has only said, that the said deed and bond were both left in his possession, but as he "then believed and now believes, not delivered" to Flagg and Mann, or either of them, as a consummation of the said conveyance and assignment, &c.

In regard to the second point (2), whether there was any stipulation in the agreement, on the part of Flagg and Mann, to pay Walker and Fisher's demands, I have still more difficulty upon the evidence in withholding my assent, that there was such a stipulation. The extraordinary result would otherwise arise, that a contract, which could only be consummated by establishing a perfect title in Richardson, was wholly dependent for its completion upon the good will of Flagg and Mann. If they did not choose to redeem Walker and Fisher's mortgage (admitting it to be such), or to establish the title of Richardson by a suit against Walker and Fisher, it is plain, that Richardson could never entitle himself to the balance intended to be secured by the note. Richardson had not the means, neither had he, strictly speaking, any right to redeem the mortgage, or to sue Walker and Fisher thereon, after his assignment of their bond to Flagg and Mann. The testimony of Richardson and Ames are full to the purpose of establishing this point; and I cannot but

think, that, under all the circumstances, they overcome the denials of the answer. That answer has, indeed, been assailed in many particulars, some of which may come under our notice hereafter.

The next point is (3), whether the agreement between Flagg and Mann contained any stipulation for the extinguishment of the title of the Frye heirs. The answer, as we have seen, denies it. It does, however admit, that after the defects in Richardson's title, from the want of the guardian's taking the proper oath, and the prior conveyance to Prentiss Richardson, were known to him (Mann), which was about the 17th of the same month of May, Flagg and he, together with Thomas P. Goodhue, did, for their mutual benefit, and at their mutual expense, employ Stephen Goodhue (who was also to have an interest) to purchase up the title of the Frye heirs, and that he went, about the 25th of the same month, to Vermont for that purpose; but he failed in the attempt. It seems, that the object of the intervention of T. P. Goodhue was not to interfere with the rights of Richardson; but to procure a title to the other moiety of the land of the Frye heirs, which had been sold at the guardian's sale to another purchaser. But the answer insists, that, upon the failure of the Vermont expedition, the agreement ended between Mann and Flagg for any joint purchase of the claim of the Frye heirs. If there could be any doubt, as to the point of the intended purchase from the Frye heirs, it would be entirely removed by the concurrent testimony of the Goodhues. Whether that agreement was contemporaneous with the purchase from Richardson, or whether it took place after the discovery of the alleged defects in his title, is not, perhaps, important to the objects of the bill, if the purchase of Richardson was not, at that time, rescinded, and if the agreement to purchase, for mutual account, the claim of the Frye heirs was not abandoned with the failure of the Vermont expedition.

And this leads me to the remaining point under this head;

and that is (4), whether there has been any absolute abandonment, by the consent of all parties, of the purchase from Richardson, and of the intended purchase from the Frye heirs, or of either. Now, in respect to these points, the *onus probandi* is properly of the defendants, since they constitute matter set up in avoidance of the objects of the bill.

And first in regard to the abandonment of the purchase from Richardson. Unless I am greatly misled, there is no sufficient evidence in the case to establish the fact, that Flagg ever abandoned that purchase. On the contrary, it seems to me, that the current of the evidence, and the acts of the parties, with some few exceptions, show, that Flagg insisted upon the purchase and his rights under it. And, unless some clear and deliberate abandonment is shown, the purchase must, in contemplation of law, be deemed a continuing contract. Unless Flagg did abandon the purchase, it could not be rescinded or repudiated by Mann alone, or by Richardson and Mann together. Richardson wholly denies any abandonment to have been carried into effect; and Mann's return of the note to Ames, after he had received it, shows, that up to that period (which was in the latter part of July, or the beginning of August, 1831), there had been no definitive rescission of it. And none with the consent of Flagg was then accomplished, even if the other parties had been willing.

Mann, by his answer, insists, however, that there was a definitive abandonment of the purchase on the 17th of May, 1831, in consequence of Mr. Hoar's opinion, and the other discoveries of the defects in Richardson's title, already alluded to. In this, he is, I will not say, certainly, but in all human probability, mistaken. In his answer to the supplemental bill, he admits, that when the expedition to Vermont was undertaken, the title of Richardson was relied on by himself and Flagg. He says, "Mr. Goodhue left Lowell for the purpose of going to Vermont, I think, on the 25th or 26th day of May, 1831. He

went for the purpose of purchasing the title of the Frye heirs to the Paddy Camp lands (the premises in question), with the agreement, that if he did purchase it, it should be for the benefit of said Flagg and myself, so far as he could hold by Luther Richardson's title, and for his and his brother's interest, so far as they might be able to hold it by a quitclaim deed, which Wood had agreed to give them." The testimony of both the Goodhues goes strongly to show, that there could not, at the time, have been such an abandonment. For, after the failure and return of Stephen Goodhue from the Vermont expedition, there having been in the meantime a discovery by Hildreth's testimony, that the oath had been properly taken before the guardian's sale, Mann told one of the Goodhues, that it was well, that they had not purchased the interest of the Frye heirs, as there was then no necessity for doing so. Indeed, after the discovery of Hildreth's testimony, and before the return of Stephen Goodhue from Vermont, Mann proposed to have a messenger sent to recall him; but it was not done, because they concluded, that he had already effected all he would be able to effect with the Frye heirs. Both of the Goodhues strenuously deny, that they ever had any knowledge, that the purchase from Richardson was abandoned by Flagg and Mann. On the contrary, their testimony leads to the conclusion, that they understood and believed, that the extinguishment of the claim of the Frye heirs was always contemplated to be in aid and not in exclusion of the title of Richardson. Even Coolidge does not pretend, that he ever knew of any actual abandonment of the purchase by Mann and Flagg, although certainly, as he was much in the confidence of the parties, and particularly of Mann, he would have been in a situation probably to have known it, if it had been definitively settled between them. I admit, that there is evidence in behalf of the defendants, which contains statements made in conversations with Mann, in which he (Mann) said, the purchase had been abandoned. But, certainly, his own statements

are not either proper or satisfactory evidence in his favor for such a purpose. The testimony of Isaac Fiske seems to me to corroborate the view already taken upon this point; for it shows, that on the 18th of May, Mann, after a knowledge of the defects of Richardson's title, was taking steps to make that title good, and to protect it by an extinguishment of the claim of the Frye heirs.

The testimony of William Heard (the brother-in-law of Mann) is, indeed, in favor of the abandonment. He says, that about the first of June, 1831, he had a conversation with Flagg and Mann, and he asked them, how they came on in purchasing the Paddy Camp lands (the lands in question), to which Mann replied, "we have done with that;" no remark was made by Flagg on that point. Afterwards, in August of the same year, Mann, in his office, handed a bundle of papers to Flagg, and said the papers related to the transactions between him and Flagg and Luther Richardson, and that Flagg was to take up their note, and he called on the witness to take notice, that he had delivered up the papers. Flagg took up the papers, and made no reply. Walker also states, that Luther Richardson, in the latter part of May, 1831, told him, that Mann and Flagg had given up the bargain, as they thought the title was not good for any thing. Fisher says, that in May or July, he cannot tell which, Luther Richardson also told him, that Flagg and Mann had abandoned their purchase of him. But, at another time, he told him, that Flagg was not willing.

It is certainly difficult to reconcile all the testimony on this point of abandonment of the purchase from Richardson. If it is reconcilable at all, it seems to me, that it is so upon the supposition, that Mann's opinion as to the validity and value of the purchase varied at different times, from the different views, which he took, at those times, of the state of Richardson's title, and of the real or supposed defects in it. At some times he had great confidence in the title; at others, he appears to have thought it

good for nothing; and he was ready to abandon the purchase. But his mind fluctuated from time to time; and it appears that there never was any final and conclusive abandonment of that title agreed to and acted on by all the parties in interest, Mann, Flagg and Richardson.

In regard to the abandonment of the joint agreement of Mann and Flagg for the purchase of the claim of the Frye heirs, there is still less evidence in favor of Mann's allegations in his answer. The Goodhues certainly did not understand, that there was any abandonment after the failure of the Vermont expedition; and the language of Mann to them, as detailed in their depositions, goes strongly to show, that he never gave up either the intention or the hope of purchasing out the Frye heirs, and that he encouraged them to believe, that a purchase might be effected. They had no notice from Mann, that Flagg had withdrawn from the object. It is plain, that the subsequent negotiations of Mann with the Frye heirs were kept concealed from Flagg; and this fact sufficiently shows, that Mann contemplated excluding Flagg from the benefit of the future purchase. But how this can furnish any proof, that Flagg had abandoned his rights, real or supposed, under the agreement, I profess not to be able to comprehend. If the agreement was not abandoned, this conduct of Mann was a meditated fraud on Flagg. If it was abandoned, the *onus probandi* to establish it is on Mann; and it should be by some proofs, clear, determinate, and full; and not by equivocal acts, or language, or intimations.

The proofs in the case do not (I regret to say) enable me to give an unlimited confidence to the allegations of Mann in his answer. There are many circumstances, in which that answer is strongly assailed, if not completely overturned by the proofs. Some of these circumstances are to collateral points, on which, therefore, I do not dwell, though in summing up to a jury they might be very important as tests of credibility. After a careful

survey of the evidence it seems to me, that the original agreement between Flagg and Mann, as stated in the bill, is fairly made out; that it has never been abandoned by the consent of both parties; and that without such consent it was, under the circumstances, incapable of any abandonment by Mann, operative in point of law to destroy it. Assuming, however, that such an abandonment of it by Mann would have been operative in point of law, if openly, fully, and absolutely made; still I should be of opinion, that until it was so made, the acts of Mann to effect a purchase from the Frye heirs, secretly done, and thereby lulling Flagg into a false security, would, in a Court of Equity, be deemed a fraud upon Flagg, and would not be permitted to avail Mann as a ground to defeat his agreement.

We are next led to the consideration of another point in the defence, which is directly brought forward in the answer. It is, that the agreement, even if clearly made out in point of fact, is void in law, as a parol agreement respecting the purchase of lands, within the purview of the Statute of Frauds of Massachusetts of the 10th of March, 1784, (Statute of 1783, ch. 37), which enacts, that no action shall be maintained upon any contract or sale of lands, or any interest in or concerning the same, unless the agreement is in writing. It seems not disputed at the bar, that the present agreement falls within the predicament of the statute, unless it is extracted from it by the fact, that some title was, at the time of the purchase from the Frye heirs, vested in Flagg and Mann under the deed from Richardson to them, or that that deed, connected with the agreement between Flagg and Mann, created *per se* a fiduciary relation, which would make the purchase by operation of law a purchase in trust for their joint benefit. It is a well known rule of the common law, that, where two persons are in possession of lands by an imperfect, and even by a tortious title, such as a title by disseisin, a release to one of them will enure for the benefit of both. The citations at the bar from Co. Litt. 194, 195, 275, 276, 277,

are fully in point. But the doctrines entertained on this subject by Courts of Equity are far more broad and comprehensive. They proceed upon the maxim of general justice, so exquisitely enforced by Cicero. *In rebus minoribus socium fallere, turpissimum est; neque injuriâ; propterea quod auxilium sibi se putat adjunxisse, qui cum altero rem communicavit. Ad cujus igitur fidem confugiet, cum per ejus fidem læditur, qui se commiserit?*[1] That maxim is but an exposition of the doctrine, that if a purchase is made by parties so interested by mutual agreement, neither party can rightfully exclude the other from what was intended to be for the common benefit; and that if one of the parties by private intrigue seeks to obtain without contract, but in violation of his good faith to his co-tenants or partners, a private benefit to himself in things touching the common right, it is a fraud, which shall turn him into a trustee for the benefit of all. Hence it is, that in cases of partnership, a contract made by one partner is deemed to be made for the benefit of all; for there is an implied obligation to act for the common benefit. In *Featherstonehaugh* v. *Fenwick* (17 Ves. R. 298), where one partner had secretly for his own benefit obtained a renewal of a lease of the premises, where the joint trade was carried on, Sir William Grant decided, that the lease was a trust for the benefit of the partnership. "It is clear" (said he), "that one partner cannot treat privately and behind the backs of his copartners for a lease of the premises, where the joint trade is carried on for his individual benefit. If he does so treat, and obtains a lease in his own name, it is a trust for the partnership." There is nothing new in this doctrine, for the same point was decided a century before in the case of *Palmer* v. *Young* (1 Vern. 276; S. C. 1 Eq. Abridg. 380). In *Carter* v. *Horne* (1 Eq. Abridg. 7, pl. 13), it was held by the Court, that where two persons agree for the purchase of an estate in

[1] Cicero, pro Roscio, Amer. Cap. 40.

moieties, neither of the purchasers has a right to secure any private or personal benefit to himself; but whatever is obtained of advantage, in paying off incumbrances, is deemed in equity to be for their mutual benefit and on a mutual trust between them.[1] *Fawcett* v. *Whitehouse* (1 Russ. and Mylne R. 132), was decided on the same principle, as was also *Burton* v. *Wookey* (6 Madd. R. 367).

Mr. Chancellor *Kent*, in *Van Horne* v. *Fonda* (5 John. Ch. R. 388, 407), applied it to a case in many circumstances resembling the present. His language on that occasion has his usual moral strength, and persuasive cogency of reasoning. "I will not say, however," (said he), "that one tenant in common may not in any case purchase an outstanding title for his exclusive benefit. But when two devisees are in possession under an imperfect title, derived from their common ancestor (the very case before him), there would seem, naturally and equitably, to arise an obligation between them, resulting from their joint claims and community of interest, that one of them should not affect the claim to the prejudice of the other, &c. It is not consistent with good faith, nor with the duty, which the connexion of the parties as the claimants of a common subject created, that one of them should be able, without the consent of the other, to buy in an outstanding title, and appropriate the whole subject to himself, and thus undermine and oust his companion. It would be repugnant to a sense of refined and accurate justice. It would be immoral, because it would be against the reciprocal obligation to do nothing to the prejudice of each other's equal claim, which the relationship of the parties, as joint devisees, created. Community of interest produces a community of duty; and there is no real difference, on the ground of policy and justice, whether one co-tenant buys up an outstanding incumbrance, or an adverse title, to disseize and expel his co-tenant. It cannot be tolerated,

[1] See 2 Fonbl. Eq. 118.

when applied to a common subject, in which the parties had equal concern, and which created a moral obligation to deal candidly and benevolently with each other, and to cause no harm to their joint interest." The present case requires the application of principles of far less stringency and comprehensiveness. In the present case the community of interest (if any) arose from direct contract between the parties; and from a direct agreement, not rescinded or abandoned, to purchase the original, as well as the outstanding, title upon joint account. In such a case there would seem to be no room for doubt, that if the parties stood in the relation of co-tenants, or joint owners, a Court of Equity ought to deem the purchase of an outstanding incumbrance or adverse title by one to be a trust for the benefit of both, if not *ex contractu*, at all events *in foro conscientiæ*. The case of *Featherstonehaugh* v. *Fenwick* (17 Ves. R. 310, 312), was decided upon this latter ground. And let me here remark, that the partnership in that case was dissoluble at pleasure. But still, as it was not actually dissolved, and as no notice was given of the intention to dissolve it, or to seek a renewal of the lease, to the other partner, it was held to be a renewal in trust for the partnership; for it was an attempt to secure clandestinely an undue advantage to the injury of that partner.

Pothier states the same doctrine in a still more general form, as having for its support a just foundation in the principles of natural equity. He denies, that one partner has a right to dissolve a partnership for his own peculiar advantage to the injury of the other partners. The renunciation (or abandonment) of the society (says he), must be made in good faith and at a reasonable time. *Debet esse facta bonâ fide et tempestivè*. The renunciation is not made in good faith, when a partner renounces to appropriate to himself alone the profit which the partners had proposed to acquire in contracting that relation. And Pothier applies the doctrine to the case, not of general partners only, but to joint agreements to purchase property on specula-

tion; putting the case of a joint agreement by two booksellers to purchase a library on joint account; where he holds, that one cannot renounce without the consent of the other, and purchase on his own sole account.[1] The civil law enforces the same enlightened morality. *At cum aliquis renunciaverit societati*, (say the Institutes) *solvitur societas. Sed plane, si quis callidè in hoc renunciaverit societati, ut obveniens aliquod lucrum solus habeat, cogitur hoc lucrum communicare.*[2] The same doctrine is fully established and illustrated in the Pandects, of which I will cite a single passage, peculiarly applicable to the very abandonment of the joint agreement for the purchase of the Paddy Camp lands, set up by Mann in the present case. *Item, si societatem ineamus ad aliquam rem emendam, deinde solus volueris eam emere; ideoque renunciaveris, societati ut solus emeres; teneberis, quanti interest meâ.*[3] A wholesome and equitable principle, which by declaring the sole purchase to be for the joint benefit, takes away the temptation to commit a dishonest act, founded in the desire of obtaining a selfish gain to the injury of a co-contractor, and thus adds strength to wavering virtue, by making good faith an essential ingredient in the validity of the purchase. There is not, therefore, any novelty in the doctrine of Mr. Chancellor *Kent*, notwithstanding the suggestion at the bar to the contrary; and it stands approved equally by ancient and modern authority, by the positive rule of the Roman law, the general recognition of continental Europe, and the actual jurisprudence of England and America.

If then a fiduciary relation did exist between Flagg and Mann, at the time of the purchases from Walker and Fisher and from the Frye heirs, it is clear, and indeed was admitted at the argument, that the purchases by Mann alone must be deemed in

[1] Pothier, Traitè de Societè Art. 150.

[2] Instit. Lib. 3, tit. 26.

[3] Dig. Lib. 17. tit. 2. l. 65. § 4.

equity to be for the joint benefit of both. But the argument is, that this fiduciary relation does not arise from a mere common hope or expectation under the contract of the parties, but from a common interest in the subject-matter of the purchase, then vested and subsisting in the parties. A mere honorary obligation is not sufficient; nor will a parol agreement without a vested interest in the property give a rightful existence to the fiduciary relation.

Passing, for the present, the question as to the fiduciary relation, arising from mere contract, let us proceed to the consideration, whether the deed and assignment of Richardson to Flagg and Mann did convey any equitable title or interest to the latter in the premises. First, it is said, that Richardson derived no title to the premises under the guardian's deed to him in June, 1823, for want of the proper oath having been taken by the guardian prior to his fixing the time and place of sale. It is admitted, that by the decisions in Massachusetts such a defect is fatal to the title.[1] But it by no means follows that, therefore, the title is utterly void, and that nothing passed by the deed. On the contrary, the deed did pass a title to the premises, defeasible and defective, indeed, as to the Frye heirs, but good, as against all the rest of the world. It was not a void but a voidable conveyance, operative between the parties; and the seisin acquired under it by Richardson gave him a lawful estate in fee, good against all persons, except the minors and those claiming under them. Even a disseisor in possession has a lawful estate, which he may alien, and the alienee will be deemed in rightful possession thereof against all persons not having a paramount title. *A fortiori*, Richardson had a rightful estate, having entered, not merely under color of title, but under a *bonâ fide* purchase without notice of any defect of title. The defect could be taken advantage of only by the Frye heirs and others deriv-

[1] Williams v. Reed, 5 Pick. R. 480.

ing title under them within the time prescribed by the statute of 1819, ch. 190, § 12. There is nothing in the case of *Williams* v. *Reed* (5 Pick. R. 480), which impugns this doctrine. On the contrary it is tacitly admitted by that case. Until, then, the title of Richardson under the guardianship deed was actually avoided by the Frye heirs, and his seisin in the premises was ousted under a recovery against him by these heirs, he must be deemed, as to all other persons, to be the lawful owner of the premises, and entitled as such to hold and convey the same by mortgage or otherwise. It seems to me wholly incompetent for Mann, deriving the title together with Flagg by purchase from Richardson, to set up the outstanding adverse title of the Frye heirs, in order to defeat the equitable rights of Flagg, accruing from the fiduciary relation created between them by that purchase, if Richardson had at the time any title in the premises.

The matter of fact, whether the oath was duly taken or not, is, however, in dispute; and upon the actual state of the evidence, if it were, as in my judgment it is not, a point essential to be decided in the present controversy, I should direct it to be tried by a jury upon an issue. I think, that it is not essential; because, in the first place, the actual title of Richardson, supposing it not to be parted with, and, putting out of sight the mortgages, and other incumbrances created by Richardson (which will presently be considered), would, upon his conveyance to Flagg and Mann, be sufficient to create a privity of title and a fiduciary relation between them, such as, upon the doctrine above stated, would raise a trust for their mutual benefit in the purchase from the Frye heirs, supposing the claim of the latter to be valid and unimpeachable. I think, farther, that, inasmuch as the agreement for the purchase from Richardson was made by Flagg and Mann, avowedly for the purpose of protecting themselves against the claim of the Frye heirs, and upon the necessary understanding, that it should be resisted by both, it is not now competent for Mann to violate that understanding,

by interposing that claim to defeat the rights of Flagg under that agreement, if it be still a subsisting agreement. I do not here proceed upon any notion of an estoppel at the common law; but upon the principles of Courts of Equity in depriving a party of the advantages obtained by what they deem a constructive fraud.

But it is argued, that at the time of the conveyance of Richardson to Flagg and Mann, he had not a scintilla of title in the premises; but that he had parted with all his title, whatever it might be, to Walker and Fisher; so that at most his possession of the premises at the time was merely that of a tenant at sufferance. And this leads us directly to the consideration of the state of Richardson's title, with reference to the transactions with Walker and Fisher.

The question is, whether the conveyance by the Richardsons to Walker and Fisher, connected with the other papers and circumstances, amounted to a mortgage, or to a conditional sale of the premises. It seems admitted at the argument, that it must be one or the other; and therefore, if either be displaced, the other must prevail. This question is to be examined, not with the views, which a court of common law might be constrained to take of it, having reference solely to the jurisprudence, which it is bound to administer; but it must be examined with the enlarged views, which are embraced by Courts of Equity in recognising, what may be called equitable mortgages. A court of law may be compelled, in many cases, to say, that there is no mortgage, when a Court of Equity would not hesitate a moment in pronouncing, that there is an equitable mortgage. The case of *Kelleran* v. *Brown* (4 Mass. R. 444), clearly recognised this distinction in Massachusetts; and, indeed, it pervades the system of equity jurisprudence on this subject.

The state of the title of Luther Richardson in the premises, at the time of the transactions with Walker and Fisher, was as follows: It was subject to the two mortgages to Goodman, Sa-

ville & Kent. The equity of redemption had been attached, and sold on execution to Proctor, who had assigned it to Bennett. Subject to these incumbrances, the Statute Equity to redeem the premises against the sale on the execution had been vested in Prentiss Richardson, under the deed of release to him from his brother Luther.[1] So that, in a legal point of view, all right of the latter thereto was extinguished. The only question, which could arise, would be, whether the conveyance of Luther to Prentiss Richardson was *bonâ fide* and absolute, or upon a secret trust in favor of Luther.

Now, upon a review of the evidence and circumstances of the case, it is clear to my mind, that the conveyance from Luther to Prentiss Richardson was not a *bonâ fide* and absolute sale, but was upon a secret trust for the benefit of Luther. It was made after the attachment and before the sale of the equity of redemption upon execution, and was probably designed to cover the equity under the sale from the reach of creditors. Both Luther and Prentiss Richardson, by their depositions, admit the fact, that the conveyance was not absolute. No actual consideration passed between them at the time; and both of them explicitly aver, that the conveyance was upon a secret trust for the benefit of Luther. Now, I admit, that this trust was, or at least might be, within the Statute of Frauds, and therefore not such as a Court of Equity would feel itself bound to enforce, if resisted by Prentiss Richardson.[2] But the trust was not utterly void between the parties; but it was, as a matter in conscience, obligatory between them. And if they chose voluntarily to act upon it, and to carry it into effect in the same manner, as if it had been in writing, and possessing a complete legal obligation, I know of no principle of law, which forbids the creation or the voluntary execution of such a parol trust by the parties, although a Court of Equity might not enforce the execution of it. Because a

[1] See *Reed* v. *Bigelow*, 5 Pick. R. 281.

[2] See *Leman* v. *Whitley*, 4 Russ. R. 427.

trust is created by parol contract, it does not necessarily follow, that it may not be enforced in Equity. On the contrary, if it be afterwards admitted, and the party does not insist upon the defence of the Statute of Frauds, a Court of Equity will decree a specific performance. There are many cases to this effect. But I need not do more than refer to *Barrell* v. *Joy* (16 Mass. R. 221), *Cottrington* v. *Fletcher* (2 Atk.R. 155), *Croyston* v. *Banes* (1 Eq. Abridg. 19), *Forster* v. *Hale* (3 Ves. R. 696; S. C. 5 Ves. 308), *Attorney General* v. *Sitwell* (1 Younge & Coll. R. 583), and 1 Fonbl. 29, B. 1, ch. 3, § 8, and note (a), *Hampton* v. *Spencer* (2 Vern. R. 288, (a). See also 2 Story on Equity, § 755, and cases there cited. And trusts, arising or resulting by the implication or construction of law, are, as we all know, expressly excepted from the operation of the Statute of Frauds.[1] Even if the original transaction between Luther and Prentiss Richardson was not upon a trust, yet it is manifest, that Prentiss, at the time of the conveyance by them to Walker and Fisher, held the title in trust for Luther, and claimed no interest whatsoever in the premises. He states the fact in his deposition, in the most explicit manner, that he then had no interest in the premises; that all his claim under the conveyance made to him by his brother was at that time satisfied; that the transaction with Walker and Fisher was for the sole benefit of his brother, and that he received no consideration whatsoever for signing the deed to them. Indeed, the bond to secure a reconveyance or a redemption of the premises within the five years, being given to Luther alone, demonstrates the truth of his statement in an entirely satisfactory manner. It appears to me, that, in the view of a Court of Equity (for I do not meddle with the question at law), the execution of the deed to Walker and Fisher, and the giving of the bond by them to Luther alone, with the assent of Prentiss, amounted to a complete execution of the trust

[1] Statute of 1783, ch. 37, § 3.

between Luther and Prentiss, and is precisely the same in effect, as if Prentiss had first conveyed the premises to Luther, and the latter had then conveyed to Walker and Fisher, taking from them the bond. Courts of Equity do not regard the forms of instruments; but they look to the intent, and give to the acts of the parties the construction, which that intent justifies and requires, as far as consistently with general principles it can be done. Here, then, is the case of an executed trust, which is wholly beyond the reach of the Statute of Frauds. It is plain, too, that Walker and Fisher understood, at the time, that Luther Richardson was the sole beneficial owner of the premises. Their bond recites the conveyance to them as being from Luther Richardson alone. The condition recites, "Whereas the above-named Luther Richardson has, by a deed of quitclaim, bearing even date herewith, conveyed to the above-bounden Walker and Fisher, all his right and title, &c. &c.;" and then the condition provides for a reconveyance to him. It seems to me, that Walker and Fisher, and all persons claiming under them, are estopped by the terms of this instrument from denying, at least in a Court of Equity, that all, which they took under the deed, was the right and title of Luther Richardson, Prentiss's formal title being extinguished by his joining in the deed; and that they were bound to reconvey all the right and title, which they so acquired. It would be unconscionable for them (and those claiming under them are in the same predicament) to set up the want of any legal title in Luther, in order to defeat the true operation of their bond, if otherwise it would make the conveyance to them a mortgage. If the objection had been stated at the time, it would (as we must all see) have been obviated by a separate conveyance from Prentiss to Luther, or by a recital in the deed, that Prentiss had the formal and Luther the beneficial interest in the premises. I am aware, that it has been said, that the reason for Luther Richardson's joining in the deed to Walker and Fisher was not to convey away his supposed title in the premises, but

merely to give validity to his wife's relinquishment of dower in the premises. It appears to me, that the very form and purport of the deed contradict this argument. The deed purports to name Luther and Prentiss as grantors, and they both convey the premises. The name of the wife does not occur except in the common *in testimonium* clause. The bond, too, as we have seen, recognises the deed, as being a conveyance from Luther of his own right and title. The testimony of Walker and Fisher necessarily admits, that Luther Richardson claimed a right to the premises, as then subsisting in himself. The whole negotiation with them was avowedly on his own account and for his own benefit, and not for his brother Prentiss.

Did, then, the transaction between the Richardsons and Walker and Fisher create a mortgage in the premises? Some things are, to my mind, exceedingly clear. In the first place, the deed to Walker and Fisher, and the bond by them to Luther Richardson, are to be treated as part of one and the same transaction. They were, in my judgment, executed at the same time; and if not, at all events they were intended to be contemporaneous in their object and operation. Neither was to be of any force or validity without the other. The bond must have the same precise effect and construction, as if it were inserted in the body of the deed. If, by being so inserted, a mortgage could be created, it was equally created by its being in a separate instrument. In the next place, no consideration whatsoever was paid by Walker and Fisher to Luther or Prentiss Richardson, on account of the deed, at the time of the execution of it, or has been at any time since. It is true, that there is the consideration of the thousand dollars stated in the deed; but it was purely nominal. No person pretends, that that sum, or any other sum was in fact paid, or intended to be paid. If this were the whole case, the deed would be merely voluntary; and the question of a conditional purchase could never arise; for to constitute a conditional purchase, there must be a sale for a valuable consideration be-

tween the parties, with a right of repurchase. A mere gift would not raise the question; and, indeed, there is no pretence in the present case to say, that any gift was intended.

What, then, was the real consideration between the parties? To me it appears plain, that there was an agreement by Walker and Fisher, at the request and for the benefit of Luther Richardson, to pay off forthwith the incumbrance of Bennett on the premises, and thereby to save the equity of redemption from being totally extinguished. On the part of Richardson, there was an agreement to convey the premises to Walker and Fisher, to secure the payment of this advance, and all other advances made by them towards the extinguishment of the antecedent mortgages and all expenditures in improvements, with a right reserved to Richardson of reconveyance upon his repayment thereof within five years. This was the basis of the papers actually executed; and the whole transaction would otherwise be without any just aim or object. Bennett's title to the premises would become in a few days absolute, unless he was redeemed. Richardson was, notoriously, unable to redeem from his own funds, and that inability constituted the ground of the application to Walker and Fisher. It would have been the idlest of forms, and the most useless of contrivances, to shift the title from Prentiss Richardson to Walker and Fisher, if it was the design of all parties, that it should perish in the space of twelve days, without any attempt of redemption. The very nature of the transaction demonstrates to my mind, that the redemption of Bennett by Walker and Fisher was the *sine quâ non* of the whole arrangement. If there could be the slightest doubt upon this head from reading the testimony of Walker and Fisher, it would be entirely removed by the other evidence, and by admitted facts. Bemis says, that about the time the papers were finishing, Bennett passed in the street, and was called in; and Walker and Fisher requested Bemis to ask Bennett to appoint a time, when they should meet him at Billerica, and pay him

the money. He did so; and Bennett appointed the time. And on the day so appointed, Walker, and Fisher, and Richardson, and Bemis, met at Billerica, and the money was paid by Walker and Fisher, and the deed was accordingly executed to them by Bennett. This is as pregnant and conclusive a proof of the real nature of the transaction, as can be desired.

Upon this posture of the case, what ground is there to say, that there was a conditional sale of the premises to Walker and Fisher? They paid nothing to Luther Richardson for any transfer of his right to them. They simply paid, at his request, a subsisting debt due from him to Bennett, and took a transfer from Bennett of his interest in the premises. Beyond this they paid nothing; and upon the reimbursement of this and all other advances, on account of the premises, within five years, the premises were to be restored to Richardson. It was in truth but the transfer of a debt from one creditor to another, with the assent of the debtor, expanding the equity to redeem the estate pledged for it from a few days to five years.

It has been said, that the true test, whether the conveyance in this case was a mortgage or not, is to ascertain, whether it was a security for the payment of any money or not. I agree to that; and indeed, in all cases the true test, whether a mortgage or not, is, to ascertain, whether the conveyance is a security for the performance or non-performance of any act or thing. If the transaction resolve itself into a security, whatever may be its form, it is in equity a mortgage. If it be not a security, then it may be a conditional or an absolute purchase.

It is said, that here there was no loan made, or intended to be made, by Walker and Fisher to Richardson; and that they refused to make any loan. There is no magic in words. It is true, that they refused to make a loan to him in money. But they did not refuse to pay for him the amount due to Bennett, and to take the premises as their security for reimbursement within five years.

It is said, that there is no covenant on the part of Richardson to repay the money paid, which should be paid by Walker and Fisher to discharge the incumbrances on the premises. But that is by no means necessary in order to constitute a mortgage, or to make the grantor liable for the money. The absence of such a covenant may, in some cases, where the transaction assumes the form of a conditional sale, be important, to ascertain, whether the transaction be a mortgage or not; but of itself it is not decisive. The true question is, whether there is still a debt subsisting between the parties capable of being enforced in any way, *in rem* or *in personam*. The doctrine is entirely well settled; and for this purpose it is sufficient to refer to *Floyer* v. *Lavington* (1 P. Will. R. 270, 271), *King* v. *King* (3 P. Will. R. 360), *Longuet* v. *Scawen* (1 Ves. R. 406), *Mellor* v. *Lees* (2 Atk. R. 496), *Goodman* v. *Grierson* (2 Ball & Beat. R. 278), and *Conway's Ex'rs.* v. *Alexander* (7 Cranch R. 237), out of many cases. Now, it seems to me clear, upon admitted principles of law, that, upon the payment of the money due to Bennett by Walker and Fisher, Richardson became their debtor for that amount, as it was paid at his request, and for his benefit. It is a common principle, that if A, at the request of B, pays a debt due by him to C, A may recover the amount in assumpsit for money paid to his use, or for money lent and accommodated. In my judgment, that is the very case at bar.

If it should be asked, why no personal obligation was given by Richardson, on this occasion, to pay the money, it might be answered, that the whole circumstances of the present case show an extreme looseness in the transaction of business between the parties; and considering, that much of it was done by the advice and with the assistance of counsel, it is not very creditable to the skill and diligence of the profession. The negotiations between Flagg and Mann and Richardson evince a most obstinate carelessness in the draft and execution of important instruments, leaving much to personal confidence, and the im-

perfect recollections of the parties, as well as that of the witnesses. And there is no ground for surprize in finding the same laxity pervade the arrangements of Richardson with Walker and Fisher. But the satisfactory answer is, that Richardson was poor and embarrassed, and Walker and Fisher relied on the premises for a full indemnity and satisfaction of all their advances, believing that Richardson would never be able to redeem. They were indifferent about the personal obligation, as they possessed an adequate fund in their own hands.

It is well known, that Courts of Equity lean against construing contracts of this sort to be conditional sales: and, therefore, unless the transaction be clearly made out to be of that nature, it is always construed to be a mortgage. So Lord *Hardwicke* laid down the doctrine in *Longuet* v. *Scawen* (1 Ves. R. 406), and it has never been departed from. The *onus probandi*, then, is on the defendants to establish it to be a conditional sale. If it be doubtful, then it must be construed to be a mortgage.

If we look to the condition of the bond, it is difficult to resist the impression, that it is precisely in its terms such, as would be appropriate, if the conveyance were a mere mortgage, to secure future advances to be made by Walker and Fisher, in discharge of the incumbrances referred to in the recital. The language of the accompanying lease points to the same conclusion. The dwelling house and garden (a valuable part of the premises), were let to Richardson for five years at a nominal rent; a proceeding not easily reconcilable with the notion of a positive purchase; but quite reconcilable with the notion of a mortgage. That lease contains some language not without significance on this subject. The lease is "for the term of five years from this date, yielding and paying therefor the sum of one cent annually, unless the said premises shall be redeemed by the said Luther, agreeably to the provisions of a bond, bearing even date herewith, from Walker and Fisher to said Luther." I do not lay great stress upon the word, "redeem," in this lease, as conclusive in

regard to the understanding of the parties, though it is a word peculiarly appropriate to the case of a mortgage; for it is sometimes used as equivalent to "reconvey."[1] But, certainly, it is not without weight in a case of this nature; and it was relied on by Lord *Hardwicke* in *Lawley* v. *Hooper* (3 Atk. R. 278), as indicative of a mortgage. But the fact, that Walker and Fisher were not to go into possession of the entire premises, but that Richardson was to retain the possession of a valuable portion for five years, without payment of any rent, is certainly important. It is remarked by Mr. Butler, in his learned note to Co. Lit. 204, b. that the circumstance, that the grantee was not to be let into immediate possession of the estate, affords a presumption of its being a mortgage.

It is not unimportant also, that, in the very assignment made of the bond by Richardson to Flagg and Mann, the conveyance to Walker and Fisher is expressly described as a mortgage. And, supposing that assignment to be a valid and subsisting instrument, it is not easy to see, how Mann can now be permitted to set up that conveyance as an absolute estate, to defeat the rights of his co-assignee, he having purchased in the title for his sole account.

But, what strikes me as most material in this case is, the allegation by both Walker and Fisher, in their testimony, that notwithstanding the conveyance to them, they did not contract, and were not bound, to pay off any of the incumbrances. If this were true, there would be an end of treating it, as has been already suggested, as a conditional purchase. I have endeavored to show, that they were positively bound to pay off Bennett's incumbrance. In regard to the antecedent mortgages, they positively deny, that they engaged to pay them off. Now, if this be true, it would be impossible to consider this as a conditional purchase, without the grossest injustice. The purchase

[1] See *Lawley* v. *Hooper*, 3 Atk. R. 278.

would be for little less than a tenth of the value of the property; for Richardson would still be personally bound for the payment of those mortgages. Nay, he would be bound to pay to Walker and Fisher, as the assignees of those mortgages, and now to Mann, as their assignee, the full amount due on those mortgages, notwithstanding the extinguishment of his title in the premises, by the lapse of the five years. Those mortgages, in their view of the matter, are still subsisting mortgages, capable of being enforced at law, and were not to be extinguished by the purchase and assignment to themselves. So, that if this be admitted to be the true interpretation of the whole arrangement, Walker and Fisher obtained property, confessedly worth, in their own opinion, more than $10,000, by the payment, at most, of the sum of $1,200 only, to Bennett. I have not heard any such doctrine contended for at the argument, although it seems to me a natural consequence from the positions assumed. If the mortgages were not agreed to be extinguished by Walker and Fisher, when they took the conveyance, nothing has since been done by the parties to extinguish them. On the other hand, if that transaction was a mortgage, the whole proceedings are in legal operation exactly, what they should be. The debt to Bennett, and the mortgages constitute a subsisting lien on the premises; and they must be paid by Richardson, before he can claim a reconveyance. Now, it has been well remarked by Mr. Butler, in the note above cited, (Co. Litt. 204, b. note (1)), that if the money paid by the grantee is not a fair price for the absolute purchase of the property conveyed to him, it affords a strong presumption, that the conveyance was a mere mortgage. The same suggestion was pointedly made in *Conway's Ex'rs.* v. *Alexander* (7 Cranch. R. 241).

On the contrary, if, in opposition to the positive testimony of Walker and Fisher, we are to deem it a part of the agreement at the time of the conveyance to them, that they should pay off the mortgages, having their security for their advances upon the

premises, then the same considerations apply to this as to the payment to Bennett. The payments so made were for debts of Richardson, and paid at his request.

I observe, that the assignments of these mortgages to Walker and Fisher speak of the debts as subsisting debts, and the mortgages as liable to be redeemed by Richardson; and Walker and Fisher are authorized to receive the sums due thereon for their own use.

But it is said, that it was distinctly understood, that the conveyance should not be a common mortgage; and that the premises should be irredeemable after the five years; and that the shape, which the negotiation took, was for the very purpose of accomplishing this object. Be it so; still if in fact the conveyance was a mere security for advances to be made to Richardson, and the premises were redeemable upon payment of these advances within the five years, in contemplation of law it was a mortgage, whatever name the parties might choose to give to it. Nothing is better settled than the doctrine, that where the conveyance is a mere security, it is a mortgage; and that if it be a mortgage, the parties cannot—by their agreement, that there shall be no equity of redemption after a limited time—change the rights of the mortgagor. The common maxim is, once a mortgage, always a mortgage. The right to redeem is a necessary incident, and cannot be extinguished by a mere covenant, that it shall not be claimed after a limited period.[1] It seems to me, that the shape of the transaction was merely to evade the principles of law applicable to mortgages. Walker and Fisher were willing to make advances to pay Richardson's debts, and to reinstate him in his equity of redemption. They were willing to give him five years to repay the advances and redeem

[1] See *Goodman* v. *Grierson*, 2 B. & Beatt. R. 278. *Newcomb* v. *Bonham*, 1 Eq. Abridg. 313, pl. 13. 2 Story's Comm. on Equity, § 1019, and authorities there cited. 4 Kent Comm. 142, 143, 3d edit.

the estate. But they meant, after that lapse of time, to hold the estate, if unredeemed, by an absolute title. This appears to be the manner in which Bemis understood the transaction; and the only mistake in the matter has been a mistake of law. Luther Richardson's own testimony points still more distinctly to the transaction, as being a mortgage in contemplation of law, whatever might have been the understanding of the parties as to its redeemable quality. The negotiation, according to his statement, began in asking a loan, and ended in an agreement to pay off all the incumbrances, taking the conveyance for the repayment within five years.

There is an intrinsic difficulty in treating this transaction as a conditional sale, in whatever manner the circumstances are viewed. It seems to be of the very essence of a sale, that there should be a fixed price for the purchase. The language of the civil law on this subject is the language of common sense. *Pretium autem constitui oportet; nam nulla emptio sine pretio esse potest*, say the Institutes.[1] Ulpian, in the Digest, repeats the same suggestion; *Sine pretio nulla venditio est.*[2] Now, here is not the slightest proof, in this case, of any sum being agreed on as the price of the purchase. No money was in fact paid; and if Walker and Fisher are to be relied on, none was contracted to be paid; and even the incumbrances were not to be discharged. The money, which was to be repaid on the reconveyance, was only what had been, in the intermediate time, actually paid to discharge the incumbrances, and expended in improvements. If none had been so paid, none was to be repaid. So that not only was there no fixed price; but the premises stood as a mere security for future advances.

Hitherto the case has been considered, upon the question of mortgage or not, upon the footing not merely of the conveyance

[1] Instit. lib. 3, tit. 24.

[2] Dig. lib. 18, tit. 1, C. 2.

and bond, but of the parol evidence admitted as explanatory of the intent of the parties. It has been suggested, however, on behalf of the plaintiff, that as the papers, upon their face, taken together, do actually import a mortgage, it is not competent to admit parol evidence to control their legal effect. There is weight in the objection; for, in my judgment, the papers, taken together, do distinctly proclaim the case to be a present mortgage for future advances. But it is unnecessary to consider this objection, as the same conclusion is arrived at upon a full survey of all the parol evidence and circumstances attendant upon the transaction.

It remains to notice another argument, which has been brought forward to prevent the conclusion, that the conveyance is a mortgage. The argument is, that the bond is not between the same parties as the conveyance. The conveyance was by Prentiss and Luther Richardson, and the bond to Luther only; so that it cannot operate as a defeasance; for (it is said) a defeasance must be between the same parties as the deed, which it is to defeat. It does not seem to me, that the question of mortgage or not depends in this case at all upon the point, whether the bond was a technical defeasance or not. There may be a defeasance of a deed of conveyance, which at the same time will not make it a mortgage. On the other hand, there may be a mortgage, although the attendant bond does not technically constitute a defeasance. If the conveyance in the present case had been confessedly a security for a loan, there could be no doubt, that in a Court of Equity it would have been deemed a mortgage, whatever might be the case at law, though I am not satisfied, that it would have made any difference at law. A Court of Equity would wholly disregard the form of the transaction, and look to the substance.

But the truth is, that, even if the bond had been between the same parties as the conveyance, it would not have constituted a defeasance of the conveyance, technically so called. Lord *Coke*

has given a very correct definition of a defeasance in stating its derivation. It is, says he, (Co. Litt. 236, b.) fetched from the French word, *defaire*, i. e. to defeat or undo, *infectum redere quod factum*. The true meaning of this language is, that it is to make void the principal deed. Lord Chief Baron *Comyns* (Com. Dig. Defeasance A.) says; a defeasance is an instrument, which defeats the force or operation of some other deed or estate; and, that, which in the same deed is called a condition, in another deed is a defeasance. *Sheppard*, in his Touchstone (p. 396), is still more direct. He says; a defeasance is a condition relating to a deed, as to an obligation, &c., which, being performed by the obligor, &c., the act is disabled and made void, *as if it had never been done*; which differeth only from a condition in this, that this is always made at the same time, and annexed to, or inserted in the same deed. But that is always made in a deed by itself. Mr. Justice *Blackstone* (2 Black. Comm. 327, 342) gives the same definition. A defeasance (says he), is a collateral deed, made at the same time with a feoffment, or other conveyance, containing certain conditions, upon the performance of which the estate then created may be defeated or totally undone. So that it is of the very essence of a defeasance, technically so called, that it defeats the principal deed and makes it void *ab initio*, if the condition is performed.[1] The very distinction was taken, and acted on in *Lacy* v. *Kynaston* (2 Salk. R. 575; S. C. 1 Ld. Raym. R. 688, 690). The present bond does not declare, that, if the condition is complied with, the conveyance shall be utterly void. On the contrary, it is to remain in full validity, and a reconveyance of the title is to be made, which necessarily supposes, that, until the reconveyance, the estate remains at law in the grantees.[2] Yet no one will for

[1] See Mr. Sergeant Williams's note to *Fewell* v. *Forrest*, 2 Saund. R. 47, note (1).

[2] See *Erskine* v. *Townsend*, 2 Mass. R. 497.

a moment doubt, that it makes no difference as to the question of mortgage, either at law or in equity, whether the condition be, that upon the payment of the money loaned the condition is to reconvey, or that the principal deed is to be void and of no effect. If there could be a doubt, the case of *Manlove* v. *Ball* (2 Vern. R. 84; S. C. 1 Eq. Abridg. 313), and *Erskine* v. *Townsend* (2 Mass. R. 403), would completely overthrow it.

It is very clear in this case, that the parties did not contemplate, that the bond to be given should operate as a defeasance; for if it had been so to operate, and the condition had been strictly performed, the estate would have been revested in Prentiss Richardson, and would not have vested in Luther Richardson, contrary to the manifest intention of the parties. The bond was therefore to reconvey to Luther; and in no sense was it a defeasance of the conveyance. But mortgage or not can never depend upon the single point, whether the instrument is a defeasance or not. If a mortgagee were to covenant in the mortgage deed, that, upon payment of the mortgage money, he would reconvey to the mortgagor, it would clearly be a mortgage.[1] If, instead of that, he were to covenant to convey it to such other person, as the mortgagor should appoint, it would not the less be a mortgage. Take the case of a clear trust estate, where the *cestui que trust* borrows money on a mortgage of the estate, and both the trustee and *cestui que trust* join in the mortgage conveyance; and the covenant is to reconvey to the trustee, upon the payment of the money by the *cestui que trust*, it would plainly make no difference, as to its being a mortgage, that the payment was not to be made by the trustee, although the reconveyance was to be to him. The conveyance would still be but a security for a loan; and that is the true test of a mortgage. The same result would arise, if the payment was to be made by the *cestui que trust*, and the reconveyance was also to be to the

[1] The case of *Erskine* v. *Townsend*, 2 Mass. R. 497, is directly in point.

cestui que trust, which I conceive to be the very case at bar. Mr. Preston, in his learned work on Conveyancing (vol. ii. pp. 201, 202), has put several cases of mortgages of this nature, where the redemption is to be by the beneficial owner alone, although the conveyance is jointly made by him and another person as the formal legal owner, without the slightest intimation of its not being an inappropriate mode of creating a mortgage. In my view of the matter, then, it is of no consequence, that the reconveyance was to Luther Richardson alone. Nor is it necessary to decide, whether the doctrine is universally true, as laid down in Sheppard's Touchstone (p. 397), that to make a deed a technical defeasance, it should be between all the same persons, who were parties to the first deed. A bond, given to a mere stranger to the original deed, certainly ought not to be construed as a defeasance. But a bond given by the grantee to one of the grantors of a deed to defeat and make void the conveyance, if executed at the same time with the conveyance, may possibly (for I do not mean to express more than a doubt) admit of a different consideration.

Upon the whole, without going more at large into this point, though there are many things, which might afford grounds for additional comments, my opinion is, that the conveyance to Walker and Fisher, connected with the bond and other transactions, was a mere mortgage or security for the advances to be made by Walker and Fisher, and not a conditional purchase by them of the estate. In cases of this sort, it is of very little consequence, what the particular language used by the parties is, whether they speak of a loan, or of a purchase, of a mortgage, or of a conditional sale. Courts of Equity look to the real nature of the transaction, stripped of all the disguises, which the parties may have thrown around it. My opinion also is, that Luther Richardson had a clear equity of redemption in the premises at the time of his conveyance to Flagg and Mann, sufficient, in a Court of Equity at least, to make them tenants in common of

that equity. I do not say, that the equity was such, as would make them tenants in common of an estate at law. It is sufficient for me to say, that they are so of an estate in equity.

The great difficulty, which I have felt in arriving at this conclusion, has arisen from the decision of the Supreme Court of the State, in the case of *Flagg* v. *Mann* (14 Pick. R. 467). That case was finally decided upon a mere question of the jurisdiction of the Court, under the Massachusetts Statute of 1823, ch. 140, § 2. The Court held, that the plaintiff and defendant were not tenants in common of the premises in the sense of that statute, and therefore, that the bill was not maintainable. I have not the slightest disposition to question the correctness of that decision; and, as a point of local law, I should feel myself bound by it. My distress has been with the other views suggested in the very able opinion delivered on behalf of the Court on that occasion. It is true, that these views, not being founded upon local law, but upon general principles of interpretation applicable to Courts of Equity, are not, and cannot from their nature be, conclusive upon this Court, in a suit in Equity addressed to its general jurisdiction. Still, however, it is impossible not to feel the just weight of that opinion upon every point in litigation in the present cause; and that, if that opinion be correct, the conveyance to Walker and Fisher was not a mortgage, and that nothing passed by the subsequent conveyance from Luther Richardson to Flagg and Mann. After a careful survey, however, of the whole case, as now presented to this Court, I have been unable to arrive at the same conclusion. This is to me matter of regret; but judicially I am compelled to follow on this occasion the results of my own judgment.

The other point, however, suggested at the argument by the plaintiff's counsel, is not undeserving of notice. It is, that even if no title in the premises did pass by the deed of Luther Richardson to Flagg and Mann; yet, nevertheless, there was a color of title in him at the time, and that the deed itself, being accept-

ed by Flagg and Mann, and an assignment being taken and notes given, under and in virtue of the parol agreement between them, for the joint purchase from Richardson, these facts did of themselves create a privity of claim and right in the premises, sufficient to establish a fiduciary relation between them. And if such a fiduciary relation actually did exist, then the purchase of Mann, from Walker and Fisher and from the Frye heirs must be treated in Equity as a purchase for the joint account of Flagg and Mann. There is great force in this argument; and I am not prepared to say, that it is not well founded.

In the first place, it seems to me clear, that if there had been a written agreement between Flagg and Mann to make the purchase from Richardson, and the purchase had been executed accordingly, while that contract and purchase remained unrescinded, it would have created a privity of contract between them, which would establish a fiduciary relation for all purposes connected with the premises, whatever might be the state of the title. I do not mean here to rely on the doctrine of estoppel, resulting from the joint conveyance to them from Richardson, for I agree with the Supreme Court of the State in thinking, that there was no such legal estoppel.[1] But I proceed upon this, that a written contract to purchase an estate upon joint account does create a fiduciary relation between the parties, as upon a mutual agency for the purposes of the contract, which neither is at liberty to defeat by a purchase on his sole account. It appears to me, that *Forster* v. *Hale* (3 Ves. R. 696. S. C. on appeal, 5 Ves. R. 308), fully supports this doctrine; for in that case the purchase was by one partner of a banking-house of a quarter part of a colliery, and the other parties insisted, that it was a purchase in trust on joint account. And they prevailed, upon the mere proof from subsequent letters of that partner,

[1] See *Flagg* v. *Mann*, 14 Pick. R. 481; *Blight's Lessee* v. *Rochester*, 7 Wheat. R. 535.

that the purchase was a trust. There was no pretence to say, that there was any title vested in the partnership in the colliery, or that it had been paid for out of the partnership funds. The whole rested upon a fiduciary relation created by privity of contract, established in writing between the parties. In the present case, it seems to me, that although the agreement was by parol, yet having been fully executed by the passing of the deed and assignment and note between the parties, the trust is fully established, so as to extract it from the Statute of Frauds. If, then, there was, upon the mere privity of a contract executed between the parties, a fiduciary relation created between Flagg and Mann, that relation, in my judgment, was sufficient to make the subsequent purchase from the Frye heirs and from Walker and Fisher a purchase for the joint benefit, independently of the point, whether an actual title in the premises under Richardson was then vested in Flagg and Mann.

I do not mean to deny the doctrine, stated at the bar, that a parol agreement by two to purchase lands will not create joint interest by way of trust, if the purchase is made by one in his own name. The authorities are not entirely agreed upon this point, though the weight of opinion may, perhaps, be, that such a case is within the Statute of Frauds. The case of *Riddle* v. *Emerson* (1 Vern. R. 108, S. C. 1 Eq. Abridg. 381), rather leans the other way. *Lamas* v. *Bayley* (2 Vern. R. 627), is more direct in favor of the doctrine; though, upon examining the decree in the Register's book, it appears, that the Lord Chancellor rather proceeded upon the circumstances of the case being too slight to found a decree. (Raithby's note (1) Ibid.) *Atkins* v. *Rowe* (Moseley R. 39) is directly against it. On the other hand, *Bartlett* v. *Pickersgill* (1 Eden R. 515, S. C. 4 East R. 577, note *b*) supports it. In this last case, the Lord Chancellor said, that, if there had been any fraud used by the defendant to prevent an execution of the agreement, it might have been otherwise. Now, if, by the agreement between Flagg and Mann

to purchase from the Frye heirs, Flagg was purposely lulled into a false security, relying on the good faith of Mann, and his privity in interest under the purchase from Richardson, and the negotiation of Mann was designedly kept secret from Flagg, in order to prevent any active competition on his part, there might be great reason for the application of this principle upon the ground of a constructive fraud.

However this may be, I do not mean, in the present case, to rely upon any fiduciary relation arising from privity of contract, but upon a fiduciary relation arising from privity of title and estate between Flagg and Mann. In this view of the case, the purchase made directly by Mann of Walker and Fisher, and also the purchase made through Adams of the Frye heirs, must be deemed, so far as Mann is concerned, as made on the joint account of Flagg and himself.

But Mann has parted with his whole title in the premises to other persons, to wit, one moiety thereof by his deed to Adams, and the other moiety thereof by his deed to Fuller; and if they are to be deemed, in the sense of a Court of Equity, *bonâ fide* purchasers for a valuable consideration without notice of Flagg's title, then they are entitled to hold the premises discharged of all claims of Flagg, except so far as may extend to any unpaid purchase-money. In regard to Adams, there is no unpaid purchase-money; for the conveyance made to him was in consideration of a contemporaneous conveyance by him to Mann of an undivided moiety of another tract of land held by Adams under a title from one Josiah Wood, Jr. In regard to Fuller, there is a considerable portion of the purchase-money still unpaid. Fuller also, by the same deed, took a conveyance of the undivided moiety in the other tract, which had been conveyed by Adams to Mann.

Now, under these circumstances, there are various questions, which arise for our consideration. In the first place, as Mann was clearly entitled to a moiety of the premises (supposing it

to be a joint purchase for himself and Flagg), he had a right to sell that moiety to whomsoever he might choose, and the sale would be no disturbance of Flagg's rights. And, under such circumstances, notice by the purchaser of Flagg's right would not in the slightest degree affect his own title. Mann has conveyed the whole of the premises by different deeds; one moiety to Adams, and one moiety to Fuller. And the question, which meets us, is, whether Adams and Fuller are to be considered as each taking a moiety of the moiety, which Mann had a right to convey, of the premises; or whether, Adams's deed having been executed on the 6th of August, 1831, two days at least before the date of that of Fuller, he is not entitled to hold the entire moiety conveyed by the deed to him by Mann. My opinion is, that the latter is his true predicament. At the time when Mann conveyed the moiety to him, he had a perfect title thereto; and his deed took full effect. And where a rightful estate is claimed by each of two purchasers, whose titles in other respects are equal (and Adams's deed was recorded on the 8th of August, three days before that to Fuller), the maxim prevails, *qui prior est in tempore, potior est in jure.* In this view of the matter, the question of notice to Adams becomes wholly unimportant; for, notice or no notice, his title is equally protected in law and in equity.

In regard to Fuller, in the next place, there are various questions presented upon the record, and made at the argument. (1.) The first is, whether he had, at the time of his purchase, notice of Flagg's title. (2.) Another is, whether, if he had no notice, his title is of such a nature (being by mere release) as entitles him to the protection of a *bonâ fide* purchaser for a valuable consideration in a Court of Equity. (3.) Another is, whether, if he is so entitled, he is not still liable, as to the unpaid purchase-money, to the plaintiff's equity, as a lien attaching thereto. (4.) Another is, whether the plaintiff has not, by his own conduct, either ratified the sale to Fuller, or at least disabled himself from now contesting it.

First; as to the question of notice. And here it is material to consider, that notice to affect Fuller must be notice of the title of Flagg under the joint purchase from Richardson; and also notice of the interest asserted by Flagg, as a trust, under the purchase by Mann from Walker and Fisher, and from the Frye heirs. The former is mainly dependent upon written documents; the latter is dependent upon mere oral agreements between the parties, and is properly a result arising by construction of law. I agree also to the criticism suggested at the bar, that it was not a wrongful act on the part of Mann to take the title from Walker and Fisher and from the Frye heirs in his own name; as it was his only security, either to compel Flagg to abandon those purchases, or, if he insisted on his share, to compel him to repay the advances made by Mann. Now, in regard to the joint purchase from Richardson, it is to be observed, that not a scrip of paper was to be found on record respecting it until the 15th of February, 1832. Until that time, no registration was made of the deed of Richardson to Flagg and Mann, or of the bond of Walker and Fisher to Richardson, or of the assignment of that bond to Flagg and Mann; and then the registration, it seems, was made by Flagg. So that there was no pretence of notice to Fuller at the time of his purchase in the preceding August by any registration. The whole title to the premises, so far as any search in the Registry would disclose it, was in Walker and Fisher; or, if the guardianship deed was invalid, was in the Frye heirs. Mann was the purchaser from both; and his title was, therefore, as that of the sole legal owner, unexceptionable, unless notice of the trust in favor of Flagg is brought home to Fuller at the time of his purchase from Mann.

In examining the charges of notice in the bill against Fuller, it must be admitted, that they are very loose and indeterminate, and hardly such as would stand the scrutiny of a Court of Equity, upon a demurrer for that cause. The first is a mere general charge, that "the said Fuller, then well knowing all and singu-

lar the premises." The next is, that "Fuller had some notice or intimation, or some reason to suspect and believe, that the said Luther Richardson, before the conveyance aforesaid to your orator and said Mann, had some interest or claim to said lands; and that such conveyance had been made to and such agreement had been made between your orator and the said Mann as aforesaid, and that your orator claimed to have some interest in the premises." It seems to me, that a charge so very loose and indeterminate, amounting to a mere intimation, or suspicion, or belief of the defendant, of some claim or interest of the plaintiff, is not such a charge of notice, as is required in cases of this sort. On the contrary, there should be a clear and positive allegation of full notice of the very title and claim of the plaintiff asserted in the bill, so that the defendant may know, with certainty and distinctness, to what he is to answer. The subsequent specifications are open to the like objection. They are too loose and too general in their structure.

But it is unnecessary to dwell on this infirmity in the allegations of the bill, because Fuller has, in the most direct and positive manner, denied having had any notice of Flagg's claim and title, or any intimation, suspicion, or reason to suspect or believe in his claim or title at the time of his purchase, or until long afterwards. And in the same explicit manner, he denies all the specifications tending to establish notice, which are asserted in the bill.

Now, upon this posture of the case, it is plain, that these strong and direct denials being responsive to the bill, are conclusive in favor of Fuller, unless they are overcome by very direct and satisfactory evidence on the other side. It is a well-known rule in Equity, that, to overcome the positive denials of an answer, responsive to the charges in a bill, there should be the testimony of two witnesses of equal credibility on the other side, or of one witness with strong and stringent circumstances. The question then is, whether such testimony exists in this case?

My opinion is, that it does not. I dismiss at once all the suggestions in relation to the rumors, as well as the notoriety, of the supposed purchase of Richardson in Lowell, because they do not bring home to Fuller any presumptions of notice. He did not live at Lowell at the time of the purchase; and if he had lived there, the recollections of the witnesses, as to the exact times of those rumors and of that notoriety (so vitally important in this case), are far too loose to found any confidence in their statements. Indeed, most of the plaintiff's witnesses on this point pretend to no exactness as to times; and this leads me to some distrust of the memory of those, who are more direct in their statements. In its very nature, such evidence, as to times and dates, is open to much question, unless it stands supported by particular fixed facts, to which it may with certainty be referred. Vague reports and rumors from strangers are not a sufficient foundation, on which to charge a purchaser with notice of a title in a third person.[1] And I think, that Lord *Hardwicke* stated the true doctrine, when, in *Hine* v. *Dodd* (2 Atk. R. 276), he said, that there ought to be clear, undoubted notice; and that suspicion of notice, though a strong suspicion, is not sufficient to justify the Court in breaking in upon an act of Parliament; or (as I would add) upon the legal rights of a purchaser.

As to the presumption of notice from the fact, that Mann and Adams and Fuller boarded together in the same house in the summer of 1831, it is impossible to rely upon it without violating the first principles of evidence. Men often board together for a long time in the same house, without any knowledge of each other's business. And there is not the slightest proof, that Fuller ever held any conversations on the subject of the title of Flagg with either Mann or Adams. On the contrary, all three of them expressly deny any such conversations.

[1] See Sugden on Vendors, ch. 17, p. 730, (7th edit.) *Hawes* v. *Wiswell*, 8 Greenl. R. 96.

As to the particular notice charged upon Fuller by the testimony of Howard, and Wood, and Hobbs, it does not in my judgment outweigh the positive denials of the answer. I cannot but think, that Howard is under some mistake in the matter; for, if the other testimony in the case, even that on the side of the plaintiff, is to be believed, it is impossible, that the title of Richardson, purchased by Flagg and Mann, could, in May or June, 1831, have been treated by any persons, as certain in itself, so as to justify the expression, that they had made a fortune by it; for there was at that time a double cloud upon the purchase, viz. that of the title of Walker and Fisher, and that of the Frye heirs, which must have been quite as notorious as the purchase itself. Besides; if we are to credit Wood's testimony, Fuller's own opinion, as expressed to him, was adverse to the notion, that the conveyance to Walker and Fisher was a mortgage; and, therefore, he could hardly have congratulated Flagg upon having made a fortune by such a purchase.

As to Wood's testimony respecting the conversation, which he had with Fuller at Concord, admitting its entire credibility, it does not reach the point, which is indispensable to establish notice of Flagg's title. Nothing appears to have been said about Flagg in the course of the conversation. The sole question was as to Walker and Fisher's title, whether it was a mortgage or not; and to this extent and this extent only it brings home notice to Fuller. But it must also be taken into consideration, that Fuller, in his answer, while he admits the conversation with Wood, utterly denies, that any names were mentioned. He says, that the conversation was very short; that Wood asked his opinion "as to a question of law, which question was stated by Wood in abstract terms, without any names, application, or any intimation, that any such case actually existed; and on said Wood's statement said Fuller gave his opinion readily, that a bond, under the circumstances enumerated by said Wood, could not create a right to redeem in the obligee, such as existed in a

mortgagor under a mortgage." So that here there is only one witness at most against the answer, which is directly responsive to a charge in the bill.

Then as to the testimony of Hobbs. He speaks to a conversation in a stage coach in August, 1831, between himself and Fuller, Flagg, the plaintiff, being present, as follows: "I asked said Fuller, if the title of said Richardson (to the Paddy Camp lands) was good; and he replied that the title was good for nothing, because the bond of Walker and Fisher to Luther Richardson was not recorded. Said Fuller referred, as I suppose, to a bond, which had been executed by said Fisher and Walker, conditioned to convey said lands to said Richardson on the payment of a certain sum of money." He adds, that although Flagg was present, "Flagg did not take any part in the conversation; and I do not recollect any thing farther, that was said by said Fuller or myself as to the said lands or the title to them." Now, it is not a little remarkable, that the witness says, that he does not recollect, what day of the month of August it was, so that it is impossible to say, whether it was before or after Fuller's purchase; and yet it is brought forward as evidence of notice to him before his purchase. And, what is yet more remarkable, Flagg said not one word of his own title to the premises on that occasion; but he was studiously silent. Why was this silence? Why did he not proclaim his title at this time to Fuller, and insist on his rights? Fuller, in his answer insists, that this conversation was long after his purchase; and he adds, that at that time he had never heard, that the bond had been assigned to Flagg and Mann. And here, again, his answer is responsive to the charge in the bill.

It is plain, therefore, that the special notice of Flagg's title, charged upon Fuller, is not established by the testimony of these witnesses in a clear and unquestionable form. And I cannot but think the doctrine of Lord Hardwicke in *Hine* v. *Dodd* (2 Atk. R. 275) which was so fully approved in *Jollard* v. *Stain-*

bridge (3 Ves. R. 478) and *Eyre* v. *Dolphin* (2 B. and Beatt. R. 301), and was acted upon by the Supreme Court of New York, *Jackson* v. *Given* (8 John. R. 137, 140), affords a very important lesson to all judges not to place much reliance upon the testimony of loose conversations or confessions of the party to overbalance his solemn denial of notice on oath in his answer.[1] So far then as the point of actual notice is concerned, it fails.

We are next led to the consideration of the question of constructive notice. In the first place, it is said, that Mann, Adams and Fuller had a joint interest in the purchases from Walker and Fisher, and from the Frye heirs; and that Mann was the agent of the others in making the purchases, and the knowledge of the agent is in contemplation of law the knowledge of his principals. Admitting the operation of this principle in its full extent, it does not seem to me applicable to the circumstances of the present case. In regard to Adams, it may well be doubted, whether Mann was his agent except for the purchase of the title of the Frye heirs to the estate held by Wood; and that is not in controversy in the present suit. In regard to Fuller, there is no evidence whatsoever, which shows, that he ever had a joint interest in the original purchase from the Frye heirs, or from Walker and Fisher. On the contrary the whole evidence satisfactorily establishes to my mind, that he was a subsequent sub-purchaser.

Then, again, it is said, that Richardson was in possession of the premises or of a part thereof at the time of the purchase by Fuller, which operated as constructive notice of Richardson's title. I admit, that the rule in Equity seems to be, that, where a tenant or other person is in possession of the estate at the time of the purchase, the purchaser is put upon inquiry as to his title; and if he does not inquire, he is bound in the same man-

[1] See also *Butcher* v. *Stapely*, 1 Vern. R. 363, Sugden on Vendors, 730, 7th edit. Powell on Mort. by Coventry and Rand 562, note.

ner, as if he had inquired, and had positive notice of the title of the party in possession. The cases cited by Mr. Sugden in his able work on Vendors and Purchasers (Ch. 17. p. 743 to 748, 7th edit. 1826) and by my learned friend, Mr. Chancellor *Kent*, in his Commentaries, (4 Kent Com. 179, 180, 3d edit.) are full to the purpose.[1] But constructive notice of this sort does not extend beyond the title of the party in possession; and the purchaser is not ordinarily bound to know, or presumed to have notice of the title, under which the party in possession claims or derives his own title. That seems fairly inferrible from the language of Lord *Eldon* in *Attorney General* v. *Backhouse* (17 Ves. R. 293); and is stated in the broadest terms by Mr. *Sugden*, in the work above cited (p. 745, 746). "Notice," (says he), "of a tenancy will not, it seems, affect a purchaser with constructive notice of the lessor's title. Therefore, if a person equitably entitled to an estate let it to a tenant, who takes possession, and then the person, having the legal estate, sells to a person, who purchases *bonâ fide* and without notice of the equitable claim, the purchaser must hold against the equitable owner, although he had notice of the tenant being in possession." It is true, that the learned author quotes no authority for this position; but his own great experience and acknowledged ability are a sufficient guaranty, that it is well founded. It would be pushing the doctrine of constructive notice to a great degree of extravagance to hold, that the purchaser was bound to know not only the title of the party in possession, but all its derivative sources. Indeed, the American Courts seem indisposed to give effect to this doctrine of constructive notice from

[1] See also *Daniels* v. *Davison*, 16 Ves. R. 249; S. C. 17 Ves. R. 433; *Taylor* v. *Stibbert*, 2 Ves. jr. R. 440; *Hall* v. *Smith*, 14 Ves. R. 426; *Meux* v. *Maltby*, 2 Swanst. R. 281; *Allen* v. *Anthony*, 1 Meriv. R. 252; *Eyre* v. *Dolphin*, 2 B. and Beatt. R. 301; *Powell* v. *Dillon*, 2 B. and Beatt. R. 414, 421, and cases there cited; *Ashton* v. *Ormsby*, 2 Sch. and Lefr. R. 595; 4 Kent. Comm. 179, 180, 3d edition.

possession, even in its most limited form. Thus, in *Scott* v. *Gallagher* (14 Serg. and R. R. 333), the Court held, that the possession of a *cestui que trust*, and the exercise by him of acts of ownership, were not constructive notice to a purchaser of the legal title from the trustee; but that there should be direct, express and positive notice of the trust. This doctrine was probably enforced by considerations growing out of our registration acts, which are designed, and with great justice, to protect purchasers against latent equities. In *McMechan* v. *Griffing* (3 Pick. R. 149), the Court held, that possession of the premises was not, under all circumstances, constructive notice of the title of the party in possession; that it is not sufficient, that the inference of notice from the circumstances is probable; but it must be necessary and unquestionable. The case of a purchase in fee by a lessee in possession is there put as one, in which no constructive notice of that purchase would be imputed to a subsequent purchaser. It is difficult to reconcile this with what is laid down in *Daniels* v. *Davison*, 16 Ves. R. 249 and many other cases.[1] In *Newhall* v. *Pierce* (5 Pick. R. 450) it was held, that the single fact, that the grantor was in possession, would not justify the inference, that an attaching creditor had constructive notice, that the grantor remained in possession under his original title, as mortgagor. In *Hewes* v. *Wiswell* (8 Greenl. R. 94) the whole subject is discussed with great ability, and the conclusion arrived at, that, at most, possession is merely implied notice, which may be rebutted, and in this respect differs from constructive notice, which cannot be rebutted.[2] These

[1] See Sudgen on Vendors, ch. 17, p. 744, and cases there cited, 7th edit. and the cases cited in *Powell* v. *Dillon*, 2 B. and Beatt. R. 421, note (a). The whole subject of notice is examined and exhausted in the notes of the learned editors, Mr. Coventry and Mr. Rand, to Powell on Mortgages, ch. 14, p. 562 to 662; *Meux* v. *Maltby*, 2 Swanst. R. 281; *Allen* v. *Anthony*, 1 Meriv. R. 282; *Grimstone* v. *Carter*, 3 Paige R. 436, 437.

[2] See Lord Ch. Baron Eyre's opinion in *Plumb* v. *Flint*, 2 Anst. R. 438.

cases do, as I think, admonish Courts of Equity in this country, where the registration of deeds, as matters of title, is universally provided for, not to enlarge the doctrine of constructive notice, or to follow all the English cases on this subject, except with a cautious attention to their just application to the circumstances of our country, and to the structure of our laws. Indeed, even in England, if we may trust to the report of the case *Oxwith* v. *Plummer*, as reported in Bacon's Abridgment (Bac. Abridg. Mortgage, *E*, § 3), and relied on by Mr. *Sugden* (Sugden on Vendors, ch. 17, p. 746, 7th edit.), the mere circumstance, that the vendor had been long out of possession, and a party in possession under a covenant from him to convey the title, would not be constructive notice to a subsequent purchaser from the vendor.

But assuming, that the possession of Richardson was constructive notice to Fuller of his title in the premises, it was notice only of his actual title, which was that of a tenant at sufferance under Walker and Fisher; and was in no just sense notice of the conveyance of Richardson to Flagg and Mann.

Then, again, it is further argued, that Fuller cannot be treated as a *bonâ fide* purchaser for a valuable consideration without notice, because, at the time of the conveyance by Mann to him, Mann was not seised, and did not pretend to be seised in fee of the premises, nor was he ever in possession thereof, nor did he pretend to any title in the premises; for the deed of Walker and Fisher was then a mere escrow, Mann being at liberty to receive or reject it within thirty days from its date (the 27th of July, 1831). There is no doubt of the general doctrine, that in a plea of a purchase for a valuable consideration, without notice of the plaintiff's title, it is necessary to aver, that the person, who conveyed, was seised, or pretended to be seised, at the time that he executed the purchase deed. That was held by Lord *Hardwicke* in *Story* v. *Lord Windsor* (2 Atk. R. 630), and

it has been fully recognised down to the present time.[1] The cases of *Walwyn* v. *Lee* (9 Ves. R. 24), *Daniels* v. *Davison* (16 Ves. R. 252), and *Jackson* v. *Rowe* (4 Russ. R. 523), insist, that it should also aver a possession in the vendor. But this proposition must be received with the qualification given to it by Lord *Redesdale*, that the conveyance purports to be an immediate transfer of the possession at the time of its execution. (Mitf. Eq. Pl. by Jeremy 275). And indeed possession of a tenant is possession of his landlord within the meaning of the rule, as was said by Lord *Eldon* in *Daniels* v. *Davison* (16 Ves. R. 252). But the doctrine, here insisted on, is strictly applicable only to a plea technically so called; and I cannot but think, that it is properly applicable only to cases, where such want of seisin or possession affords presumptive evidence of a defect of title in the grantor to make the grant sufficient to put the purchaser upon inquiry.[2] But, be this as it may, here the whole merits of Fuller's title are laid open upon his answer. The true question, in all cases of this sort, where the purchaser, in his answer, insists upon the defence of his being a *bonâ fide* purchaser without notice, is, whether he has acted with good faith, and purchased under circumstances of an apparent right in the vendor to convey. Now, upon the reasoning and circumstances already suggested, Fuller, at the time of his purchase, had no actual or constructive notice of the title of Flagg. The question is, whether he had any notice of any defect in the title of Mann, at the time of the conveyance to him, viz. on the 8th of August, 1831. It is very clear, that Mann asserted, that he then had a complete and perfect title to convey the premises to Fuller; and Fuller paid a very large and apparently full consideration for the purchase of a good title. It is true, that, in a technical sense, Mann had not a complete and entire seisin of

[1] See Sugden on Vendors, ch. 18, p. 757, &c. 7th edit.

[2] See Beames's Pleas in Equity, 235.

the premises at that time under Walker and Fisher, if their deed was then an escrow, though he was entitled thereto at his own absolute option, at any time within the thirty days. The title of the Frye heirs, however, if they had any, was actually vested in him by the deed of Adams to him. And against all the world, except Flagg, the very allegations of the bill admit, that he had a good title. But it appears to me by no means clear upon the bill and answer, that at the time of the conveyance to Fuller, there had not been an absolute delivery of the deed of Walker and Fisher to Mann. The bill explicitly states, that Walker and Fisher did actually convey their title to the premises to Mann by their deed on or about the 27th of July, 1831. The answer of Mann says, that it was an escrow at that time; but that it was actually delivered to him on or about the 8th of August, 1831. But there cannot be a reasonable doubt, that he did then affirm to Fuller, that he was then in the actual seisin of the premises, and that he had a complete title thereto; and that Fuller purchased, trusting to the good faith of Mann. In point of fact, the possession of Richardson was a possession as a tenant at sufferance, under Walker and Fisher, and not adverse to them; and on the 10th of August, 1831, there was an admitted perfect title in Mann to convey the premises against every body but Flagg. Let us put the question, then, whether, setting aside the claim of Flagg—a claim secret and unknown to Fuller—the latter is not absolutely bound by his purchase? Could Fuller, either in law, or in equity, now set up the defence, that Mann's conveyance to him was void and inoperative, by reason of the possession of Richardson, or the title of Walker and Fisher being outstanding upon an escrow, when the conveyance was made to him? I think not; and if so, then it seems to me, that he has a right to insist, that he is, under all the circumstances, to be treated as a purchaser for a valuable consideration without notice, because Mann undertook to convey, and did convey to him, all the title of Walker

and Fisher, and of the Frye heirs, in the premises. The seisin of Walker and Fisher, and the possession of their tenant, Richardson, was, if their deed was at the time a mere escrow, a seisin for the benefit of Mann under his contract with them. If a *cestui que trust* in fee conveys the estate to a purchaser, and the trustee afterwards confirms the sale, and releases to the *cestui que trust*, or to the purchaser, it seems to me, that such a purchaser is entitled to protection, against any antecedent secret trust, which is unknown to him at the time of the purchase, and the confirmation is operative, notwithstanding, that in a strict sense the *cestui que trust* was not seised of the estate at the time of his conveyance. But the present case is far stronger; for the title of Fuller was complete, by an absolute delivery of the deed by Walker and Fisher to Mann, on or before the 10th of August, 1831; and there is not, in my judgment, any sufficient proof whatsoever, that, between the 8th and 10th of August, 1831, nor indeed until long afterwards, Fuller had any notice of Flagg's title. After the 10th of August, Fuller was clothed with a complete legal title, and a subsequent notice ought not to affect him. It does not appear to me, therefore, that this objection ought to prevail against Fuller's title.

And this leads me, in the next place, to the consideration, whether Fuller's title, being by a mere deed of release, is such a conveyance as entitles him to the benefit of the plea of a *bonâ fide* purchaser without notice. This is a point, upon which I have felt very great difficulty; and it was suggested, at the argument, as matter of grave consideration. If the language of the deed had been, that Mann merely released to Fuller all his right, title, and interest in the premises, there might, perhaps, have been more difficulty to found the defence; for then it might, under some circumstances, be construed to convey no more than Mann could rightfully convey, and that the purchaser should take at his peril, subject to all the rights and equities of third persons in the premises. But, here, the language of the deed is, that Mann, in consideration of $40,000, does "remise, re-

lease, and for ever quitclaim unto the said Elisha Fuller, his heirs and assigns, one undivided half of a certain tract of land," &c. (describing it) to have and to hold to Fuller, so that neither Mann nor his heirs, nor any other person claiming from or under him, shall have, claim, or demand any right or title to the premises. If this deed were to be construed as a mere release, the objection taken to it at the bar would be well founded; that, as the releasee was not in possession, it was a void conveyance. But we all know, that this is a common mode of conveyance in Massachusetts; and that, where it is for a valuable consideration, *ut res magis valeat quam pereat*, a deed of release has been construed to be a bargain and sale, or other lawful conveyance, by which the estate might pass. It was so decided in *Pray* v. *Peirce* (7 Mass. R. 381); and it was still more elaborately examined and solemly adjudged in *Russell* v. *Coffin* (8 Pick. R. 143, 151 to 154.) And indeed, it is but an expansion of the principle laid down in Sheppard's Touchstone, p. 82, "that a deed, that is intended and made for one purpose, may enure to another; for if it will not take effect that way, that is intended, it may take effect another way."

I am not aware, that a purchase by way of a mere release, like the present, has ever been set up in England as a defence in a case of this sort. The researches of counsel have not discovered any such case; and I am much inclined to believe, that none exists. Still, however, it is not absolutely incompatible with the nature of a release, where, by reason of a privity of estate between the parties, it operates by way of enlarging the estate of the releasee, or of passing the estate of releasor, that it should be a sufficient foundation, if *bonâ fide* made, for a valuable consideration, and without notice, to support the defence. There may be a difference, where the release is to operate, merely by way of passing a right, or by way of extinguishment.[1] The very

[1] See the different kinds of Releases stated in 2 Black. Comm. 324, 325.

plea in *Walwyn* v. *Lee* (9 Ves. R. 24), which is given in the appendix of Mr. Beames's work on Pleas in Equity, was of a conveyance by lease and release. And certainly it would have made no difference, if the lease, instead of being a contemporaneous act, had been an existing lease in privity of estate. It is true, that in *Walwyn* v. *Lee*, there were covenants, that the releasor was seised of a perfect, absolute, and indefeasible estate in fee simple in the premises. But I am not aware, that any covenant of this sort, or any covenant of general warranty has ever been held necessary to entitle the purchaser to make the defence. It ordinarily affords very conclusive proof, that the purchase is of the whole estate, and not of the mere right or title of the party, whatever it may be. But if it is apparent from the whole transaction, that the purchaser bought the estate under circumstances, which demonstrate, that he had no suspicion of the title not being perfect, as by giving a full price for an unquestionable and unquestioned fee simple, it seems to me, that the absence of any covenants of general warranty ought not to take away from him the common protection. He has, under such circumstances at least, an equal equity with any person claiming under an outstanding and unknown trust; and if so, the legal title, combined with his equity, ought not to be disturbed.

In the present case the release of Mann to Fuller must, as I think, be treated as a bargain and sale or other lawful conveyance, upon the doctrine already asserted by the Massachusetts Courts, which seems to me founded in sound sense and solid legal reasoning. It was an effectual conveyance to pass the whole estate to Fuller; and, as far as we have any means of knowledge, the title, which actually passed, is perfect as to all persons but Flagg. It steers wide, therefore, of the doctrine in *Vattier* v. *Hinde* (7 Peters R. 271). Flagg's title is founded upon a constructive equity, not apparent upon any of the title deeds; and being secret and unknown to Fuller, cannot be allowed to prejudice Fuller's rights.

In this view of the case as to Fuller, the point, as to the supposed acquiescence of Flagg in the purchase, and thereby giving it an indirect confirmation, becomes unimportant to be considered. It appears to me, indeed, that this point cannot upon the evidence be maintained. The doctrine stated at the bar is well founded, that, in order to make such acquiescence binding on Flagg, it should be proved, that he had full knowledge of all the facts affecting his legal and equitable rights; and that, with such knowledge, he did some open unequivocal act confirmatory of or recognising the validity of Fuller's title; or that by his silence the latter was purposely and injuriously misled into the belief, that his title was valid, and that Flagg did not mean to controvert it. In *Cockerell* v. *Cholmeley* (1 Russ. and Mylne R. 425; S. C. Tamlyn R. 445) the Master of the Rolls said: "In equity it is considered, as good sense requires it should be, that no man can be held by any act of his to confirm a title, unless he is fully aware at the time, not only of the fact, upon which the defect of title depends; but of the consequence in point of law." *Cholmondeley* v. *Clinton* (2 Meriv. R. 362) and *Shine* v. *Gough* (1 Ball and Beatt. R. 444, 445) are not so direct; but they presuppose the same principle.

The next and last point, under this head, is, as to the purchase money unpaid by Fuller. If his title to the land is to be deemed good and valid, as in my judgment it is, then it is clear, that the plaintiff has the same lien for his share thereof, as he would have had for the like share in the land itself, if it had remained in the hands of Mann. The one fund is but a substitute for the other, with this qualification, that it is the purchase money unpaid at the time, when Fuller had notice of the plaintiff's equity. My impression is, that upon the evidence, that will be found not to have been earlier than October, 1831. It may possibly have been at a somewhat later period. But, that can, if necessary, be more accurately ascertained by the master.

I have thus gone over the main grounds of this extremely

complicated cause. Many other incidental topics, both of law and of evidence, were urged at the hearing, which have not escaped my subsequent notice; but which would unnecessarily encumber this voluminous case. It is sufficient to say, that they have had no tendency to shake my opinion upon the merits of the case, or upon the points already discussed.

Upon the whole my judgment is, that the plaintiff is entitled to a decree declaring him in equity entitled to one moiety of the land purchased by Mann of Walker and Fisher, and of the Frye heirs, which was conveyed to the plaintiff and Mann by Richardson's deed to them. That moiety having been sold by Mann to Fuller, the plaintiff is entitled to a moiety of the purchase money, as a substituted fund, deducting therefrom all the sums, which have been paid by Mann on account of the same lands to Walker and Fisher and to the Frye heirs, and all other expenses incurred in the premises.[1] As the conduct of Mann in these purchases, and in the sale to Fuller, was a constructive fraud upon the plaintiff, I incline to think, that the decree ought to be, that Mann should pay the amount, that shall thus be found due to the plaintiff, after the deductions aforesaid, out of the purchase money received by him from Fuller, if sufficient shall have been received for this purpose, together with interest upon the sums so received; and that there ought to be a decree against Fuller for any deficiency in the amount due to the plaintiff, not paid by Mann; for which also there is, and ought to be, as a part of the unpaid purchase money, a lien on the land in the possession of Fuller.

These last, however, are matters, which can be properly adjusted, when the cause comes before the Court for a final decree. At present, there must be an interlocutory decree, referring it to a master to examine and report to the Court, what

[1] See *Fox* v. *Mackreth*, 2 Coxe R. 320. S. C. 2 Bro. Ch. R. 400, which seems to have proceeded on similar principles.

sum upon the principles above stated is due to the plaintiff, with such explanatory remarks, as he may think proper to bring to the view of the Court upon the suggestion of either party.

From what has been already said, the Bill will ultimately, though not at present, be dismissed as against Adams. But, from all the circumstances of the case I do not think, that he stands in a predicament to be entitled to costs; for he has been very properly made a party; and indeed he has been so much mixed up with some parts of the transaction, as a *dux facti*, as to create some doubts, if he was wholly ignorant of the plaintiff's equity.

The decree was as follows:

This cause coming on to be heard upon the original and supplemental suit, before the honorable Joseph Story, Associate Justice of the Supreme Court of the United States, and the honorable John Davis, District Judge of the District aforesaid, at this present term, in the presence of the counsel on both sides. Whereupon, and upon debate of the matter and hearing, the defendants' answers, and the testimony and proofs taken and read in the said cause, and of what was alleged by the counsel on both sides, the said Court doth think fit, and doth declare, that there is full proof of the agreement of the said Flagg and Mann, for the purchase of the right and title of the said Luther Richardson, and also for the purchase of the title of the Frye heirs, in the premises on joint account, as in the said bill is mentioned; and that the said agreement is now in full force, it never having been abandoned by the voluntary consent of both of the parties. And doth further declare, that at the time of the said purchase, from the said Luther Richardson by the said Flagg and Mann in the bill mentioned, the said Luther was seised and possessed of an equity of redemption in the premises, and that the said Walker and Fisher were seised and possessed of the premises in mortgage, and not of an absolute irredeemable estate

therein; and that the said Flagg and Mann became entitled to the equity of redemption of the same, under and in virtue of the purchase from the said Luther Richardson, as aforesaid. And doth further declare, that the purchases subsequently made by the said Mann from Walker and Fisher, and from the Frye heirs, ought to be deemed in equity as purchases for the joint account of the said Flagg and Mann, as in the said bill is mentioned, and not for the sole account of the said Mann; and that the said Flagg is, and ought now to be, entitled to the benefit of a moiety of the said purchases, he paying and allowing to the said Mann one moiety of the moneys paid, and costs and charges incurred in the same purchases. And doth further declare, that, inasmuch as the said Mann was, at the time of the sale of one moiety of the premises to the said Adams, fully and absolutely entitled to the said moiety, in his own right, that the conveyance to the said Adams is, and ought to be, deemed free from any equity of the said Flagg therein; but that the said Adams is not, under all the circumstances, entitled to any costs. And doth further declare, that the said Fuller is, and ought to be, deemed a *bonâ fide* purchaser for a valuable consideration, without notice of the equity of the said Flagg in the other remaining moiety of the premises, and, therefore, is entitled to hold the same free of any equity claim and lien of the said Flagg therein, except as to so much of the purchase money as was unpaid when he the said Fuller had full notice of the said Flagg's equity and claim to the premises, as the same equity and claim are affected in the bill; for all which it is hereby declared, that there is a lien on the premises for the benefit of the said Flagg. And doth further declare, that the said Mann, in the said sale of the premises to the said Fuller, as is in the bill mentioned, without the knowledge or consent of the said Flagg, was guilty of a wrong and constructive fraud upon the rights and equity of the said Flagg, in the premises, and that, therefore, the said Mann is primarily liable to pay over to the said Flagg one

moiety of all the purchase money, for which the premises were sold, after deducting therefrom one moiety of the several sums paid by him to the said Walker and Fisher, and to the Frye heirs, for the purchase, assignment, and extinguishment of the interest, right, and title to the premises, and all expenses incident thereto; together with interest upon the same moiety of the same purchase money, from the time when the same was received; if the Master shall, under all the circumstances, report any to be due. And the Court doth order and decree, that it be referred to Charles Sumner, Esq. appointed a Master for this purpose, to take an account of all the moneys received and paid, and expended in the premises; and especially to take an account of all the moneys paid by the said Mann, for the purchases aforesaid, and the expenses incident thereto. And also of all the moneys paid by the said Fuller to the said Mann, and the times when the same were paid, &c.; and whether, and at what time, he had notice of the said Flagg's equity and right in the premises, and what sums now remain due from the said Fuller. And the Master is also to report upon all other matters and things, which may be necessary and proper to carry into full effect this interlocutory decree, and especially in regard to interest, &c. &c. And all further orders and decrees are reserved for the further consideration of the Court.

The Schooner Reeside, Gilman Stanley and another, Claimants.

A usage or custom will be admitted to ascertain the nature and extent of contracts, not arising from express stipulations, but from implications, presumptions, and acts of an equivocal character; or to ascertain the true meaning of particular words in a given instrument, when these words have various senses. But it will not be admitted to control, vary, or contradict a written and express contract.

Held, that evidence is not admissible to vary the common bill of lading, by

which the goods were to be delivered in good order and condition, the *danger of the seas only excepted*, by establishing a custom, that the owners of packet vessels between New York and Boston, should be liable only for damage to goods occasioned by their own neglect.

Losses by "danger of the seas" are such as are of an extraordinary nature, or arise from irresistible force, which cannot be guarded against by the ordinary exertions of human skill and prudence. The mere rolling of a vessel by a cross sea is not such a danger.

LIBEL on a bill of lading *in rem* for damages done to certain goods shipped on a voyage from New York to Boston. There was a special claim and answer; and the decree of the District Court was in favor of the libellants; from which the claimants appealed to the Circuit Court.

The libel in substance stated, that the goods in question, nine bales of carpeting and one box of binding, were shipped in good order and condition on the 15th of August, 1836, on board the schooner *Reeside*, owned by the respondents, and of which one Mayo was then master, bound from New York to Boston, and were "to be delivered in the like good order and condition at the port of Boston, *the danger of the seas only excepted*, unto Fowle & Brewer (the libellants), or to their assigns, he or they paying freight for the same nine bales and one box." The *gravamen* alleged in the libel was, that the bales of carpeting were greatly damaged and injured by absorbing a great quantity of oil, which leaked from a large number of casks of oil, near which the carpeting was improperly stowed, and not by the perils of the seas.

The answer, after contesting negatively the allegations of the libel, as to the cause of loss, except as to one bale of the carpeting, for the damage to which the respondents admitted their liability, and after affirming, that the loss sustained was by the perils of the seas, and by the extraordinary rolling of the schooner during the voyage, by reason of high winds, proceeded in the fourth article to assert, that there was an established usage or custom of the packet vessels, engaged in trade between New

York and Boston, "that the ship owners should see the merchandise, committed to them, properly secured and stowed, and, that being done, the ship owners should not be liable to pay for any damage not occasioned by their neglect;" and afterwards insisted upon the benefit of this usage or custom, as exempting them from liability in this case, except for the one bale above referred to. An exception was taken to this article, as being incompetent in point of law to be admitted to proof. This exception was argued separately, before proceeding to consider the merits of the case.

C. P. and *B. R. Curtis* for the libellants; and *P. Sprague* and *W. Gray* for the respondents.

STORY J. I own myself no friend to the almost indiscriminate habit, of late years, of setting up particular usages or customs in almost all kinds of business and trade, to control, vary, or annul the general liabilities of parties under the common law, as well as under the commercial law. It has long appeared to me, that there is no small danger in admitting such loose and inconclusive usages and customs, often unknown to particular parties, and always liable to great misunderstandings and misinterpretations and abuses, to outweigh the well-known and well-settled principles of law. And I rejoice to find, that, of late years, the courts of law, both in England and in America, have been disposed to narrow the limits of the operation of such usages and customs, and to discountenance any further extension of them. The true and appropriate office of a usage or custom is, to interpret the otherwise indeterminate intentions of parties, and to ascertain the nature and extent of their contracts, arising not from express stipulations, but from mere implications and presumptions, and acts of a doubtful or equivocal character. It may also be admitted to ascertain the true meaning of a particular word, or of particular words in a given instrument, when the word or words have various senses, some com-

mon, some qualified, and some technical, according to the subject-matter, to which they are applied. But I apprehend, that it can never be proper to resort to any usage or custom to control or vary the positive stipulations in a written contract, and, *à fortiori*, not in order to contradict them. An express contract of the parties is always admissible to supersede, or vary, or control, a usage or custom; for the latter may always be waived at the will of the parties. But a written and express contract cannot be controlled, or varied, or contradicted by a usage or custom; for that would not only be to admit parol evidence to control, vary, or contradict written contracts; but it would be to allow mere presumptions and implications, properly arising in the absence of any positive expressions of intention, to control, vary, or contradict the most formal and deliberate written declarations of the parties.

Now, what is the object of the present asserted usage or custom? It is to show, that, notwithstanding there is a written contract (the bill of lading), by which the owners have agreed to deliver the goods, shipped in good order and condition, at Boston, the danger of the seas only excepted; yet the owners are not to be held bound to deliver them in good order and condition, although the danger of the seas has not caused or occasioned their being in bad condition, but causes wholly foreign to such a peril. In short, the object is, to substitute for the express terms of the bill of lading an implied agreement on the part of the owners, that they shall not be bound to deliver the goods in good order or condition; but that they shall be liable only for damage done to the goods occasioned by their own neglect. It appears to me, that this is to supersede the positive agreement of the parties; and not to construe it. The exception must, therefore, be sustained.

At a subsequent day the cause came on to be heard upon the depositions and other proofs. The important facts are embodied in the opinion of the Court.

STORY J. The only remaining question, then, is whether the damage to the goods in this case has been occasioned by the danger of the seas, for there is no dispute as to the fact of the actual damage. I am not satisfied, that there was any bad stowage in this case; though it does appear to me, that, considering the nature of the principal cargo (two hundred barrels of oil), it would have been very fit and proper to have stowed the carpeting in a more prudent manner, in some other part of the vessel. I cannot attribute the damage in this case to any danger of the seas. It seems to me, that the weather was not worse than what must ordinarily be expected to be encountered in such a voyage; and the rolling of the vessel by a cross sea is an ordinary incident to every voyage upon the sea. The phrase "danger of the seas," whether understood in its most limited sense, as importing only a loss by the natural accidents peculiar to that element; or whether understood in its more extended sense, as including inevitable accidents upon that element, must still, in either case, be clearly understood to include only such losses as are of an extraordinary nature, or arise from some irresistible force, or some overwhelming power, which cannot be guarded against by the ordinary exertions of human skill and prudence.[1] It is scarcely necessary to do more upon such a subject than to refer to the cases collected on this head by Lord Tenterden in his Treatise on Shipping (Abbott on Shipp. p. 3, ch. 4, § 1—8), and by Mr. Chancellor *Kent* in his learned Commentaries (3 Kent. Com. 299, 300 (3d edit.) and note); id. 216, 217.

There is no evidence in the present case, which satisfies my mind, that, if the oil had been properly coopered and properly stored, the rolling of the vessel in the manner stated would have

[1] See Story on Bailm. § 512 to § 525. 2 Marsh. on Insur. ch. 12, § 1, p. 487, 492. Abbot on Shipp. Pt. 3, ch. 4, § 1. 3 Kent Comm. Lect. 47, p. 216 (3d edit.). Id. 217. *Elliot* v. *Russell*, 10 John. R. 1.

produced any such damage, as occurred in this case. It is remarkable, that none of the witnesses, who have been accustomed to carry oil on similar voyages, speak of any damage having occurred under like circumstances from the mere rolling of the vessel in a cross sea, or indeed of any damage at all.

But the evidence does establish to my mind most conclusively, that the casks of oil were in very bad order, and very improperly coopered, when they were shipped; and that the whole damage was occasioned by the uncommon leakage from the casks, arising from their bad condition when shipped. If the casks had been shipped in proper order, it is incredible, that the leakage should have been so extraordinary, especially when it abundantly appears, that the rolling of the vessel was for a short time, and did not start any of the casks from their original position. The appearance of the casks, upon their being landed at Boston, struck one of the most favorable of the respondent's witnesses (Capt. Nichols) with great surprise, and produced an inquiry on his part, whether they were in good order, when taken on board. To which the reply of the mate was, that they were. But Capt. Nichols said, that the hoops were loose, more than usual, and that he does not know, whether they were properly coopered or not.

It is true, that the New York witnesses, who did the work under the principal cooper in that port, express a positive opinion, that the casks, when shipped, were well coopered and in good order; and that they did all the necessary cooperage. But though they are competent witnesses, it is impossible to wink out of sight, that they stand in a position somewhat peculiar, and under influences not wholly without a bearing upon the cause. They come to purge themselves and their employer from the imputation of gross neglect in the discharge of duty.

On the other hand the Boston witnesses are in an entirely different predicament, and disconnected from all influences, which can fairly be supposed to disturb their judgment. They

also speak, not to matters of opinion merely, but to facts also. They not only declare, in the most unequivocal terms, that the casks were in very bad order, when they were unladen in Boston; and that they did not, with the exception of three or four, bear any marks of having been recently coopered, and that, in their judgment, they had not from their appearance been recently coopered, but were a lot long put up; but they state the fact, that they were obliged to cooper a large number of them, when unladen, on account of their bad leaking at the time. Indeed, the leakage was so great, that out of one lot of fifty casks belonging to Mr. Brown (one of the shippers), he stated, that one hundred and thirty-four gallons and a half of oil had actually leaked out during this very short voyage; and the whole testimony shows, that the vessel was not even subjected to a heavy cross sea for more than an hour or two. If, indeed, under the circumstances testified to, the rolling of the vessel from the cross sea could have occasioned so much leakage, it would be difficult to satisfy my mind, that there was not grossly improper stowage; for it would be impossible to treat it as a peril of the sea, which could not have been avoided by the ordinary exercise of human prudence and skill.

There is a most significant circumstance in the evidence, established, as I think, beyond all reasonable controversy, which shows, that Capt. Mayo, the master of the Reeside, took the same view of this matter, *recenti facto*. It seems, that Mr. Brown had procured insurance on his shipment of oil; and finding, on the arrival, that the oil was in such very bad order, and that there had been such an extraordinary leakage, he applied to Capt. Mayo to ascertain, what had been the weather during the voyage, so as to know, whether he might claim the loss from the underwriters, as arising from the perils of the seas. Capt. Mayo, with a knowledge of his object, so far from encouraging any hope of this sort, explicitly stated, "that he had had a very good passage, and a blow only for an hour or two."

Mr. Ellison (a clerk in the store of the libellants), has given a statement, which entirely corroborates that of Mr. Brown, if indeed it should be thought to require (as I do not think it does) any corroboration. He also had a conversation with Capt. Mayo respecting the damage done to the carpeting, and said to him, that it could not have arisen from the perils of the sea, because there had been good weather; to which Capt. Mayo assented, as he did to the additional statement by the witness, that, if the libellants had been insured, they could not have recovered of the underwriters. And Capt. Mayo then added, "that if the port warden gave them a certificate, that the goods were properly stowed, they were not liable to pay for damage; otherwise they were."

There is another fact, which, I cannot but think, adds no inconsiderable strength to the case for the libellants. It is, that the carpeting was folded and pressed by a power press in the bales in so close a manner, that unless the leakage was to a very extraordinary extent, the oil never could have penetrated farther than through the external folds or than through the mere edges of the bales; whereas in fact it penetrated or was absorbed through the edges of every successive fold of the carpeting (the bales of carpeting being stowed on their ends) to the depth of from six to eighteen inches. This circumstance demonstrates, not only, that the leakage was very great, but, that the carpeting was exposed to the action of the oil for a considerable length of time.

Upon the whole, after examining the testimony, I am fully satisfied, that the injury did not arise from the dangers of the seas, properly so called, but from the oil not being properly coopered and shipped in good order; and, therefore, the libellants have maintained their libel; and the decree of the District Court ought to be affirmed with costs. It has been suggested, that this case is of great importance to the packet ship interest. It may be so. But in my judgment it is quite as important to the

shipping interest. And if packet owners could, under circumstances like the present, escape from responsibility for like losses, it would be in the highest degree mischievous to the best interests of trade and navigation. No honorable merchant, tolerably attentive to his own interest, ought to be willing to risk his goods upon any voyage, unless he can have some adequate security against losses of so serious a nature. It would be to hold out to packet masters a premium for indifference, or carelessness, or want of vigilance in protecting the shipments confided to their care. I cannot but deem every relaxation of the common law in relation to the duties and responsibilities of the owners of carrier ships to be founded in bad policy, and detrimental to the general interests of commerce.

The decree of the District Court is affirmed with costs.

UNITED STATES IN ERROR,

v.

WILLIAM PEARCE JR. AND ANOTHER.

The Act of Congress of 1822, ch. 107, provides, that whenever the emoluments of certain collectors of the customs "shall exceed $3,000 in any one year, &c. *the excess* shall in every such case be paid into the treasury of the United States." The defendant was collector of the port of Gloucester, and was removed from office July 29th, 1829. From January 1st of the same year to the day of his removal, he had received for salary, fees, and commissions $3,457 83; the excess of this over $3,000, after deducting certain legal expenses, he paid to the treasury of the United States. *Held;* that all the fees and commissions received by the collector are to be deemed to be received for his own use, until they exceed the maximum amount of $3,000; that the defendant was, therefore, absolutely entitled, in his own right, to the fees and emoluments of office, not exceeding $3,000, received during the seven months preceding his removal, although he did not continue in office a whole year from January 1st; and that the year of his successor in office commenced on the day of his appointment, and ended with the same day in the succeeding year.

DEBT by the United States upon the official bond of the collector of the port and district of Gloucester, in Massachusetts. Plea, *non est factum*. At the trial the jury found a verdict for the plaintiffs for the sum of $1,157 67, upon which judgment was rendered in the District Court of Massachusetts District in favor of the plaintiffs. There was a bill of exceptions taken at the trial by the plaintiffs, upon which the present writ of error was brought.

From that bill of exceptions it appeared, that the defendant, William Pearce, (the time of whose appointment did not appear) was collector of the customs for the port of Gloucester, in 1829, and was removed from that office, by the President, on the 29th of July of the same year. Between the 1st day of January of the same year and the day of his removal from office, he had received, for salary, fees and commissions, the sum of $3,457 83, of which $144 70 was for salary, $473 35 for fees, and $2,839 78 for commissions. From this aggregate sum there was deducted the sum of $216 62 for official expenses during that period, and the sum of $241 21 paid over by Pearce to the Treasurer of the United States. The balance, $3,000, Pearce claimed a right to retain as the maximum compensation for his services for the year 1829. The United States allowed to Pearce the sum of $1,736 41, the maximum compensation from the 1st of January, 1829, to the time of his removal from office, and insisted upon their right to the balance ($1,263 28). And the District Attorney, at the trial, accordingly prayed the District Judge so to instruct the jury; which instruction the District Judge refused to give; and instructed the jury, that Pearce had a right, by law, to retain the whole of the said sum of $3,000 for his compensation from the 1st of January, 1829, to the day of his removal from office; and the jury, accordingly, in their verdict disallowed this claim of the United States.

J. Mills, District Attorney for the United States; *R. Choate* for the defendant.

STORY J. The only question, arising upon this writ of error, is upon the instruction given to the jury by the learned Judge of the District Court, as set forth in the bill of exceptions. The question, then, is, whether this instruction is correct in point of law; and the solution of it depends upon the true interpretation of the statutes of the United States upon this subject. The only statutes upon this subject are the statute of 1799, ch. 129, § 2, and the statute of 1822, ch. 107. The former statute provides for the payment to the collectors of the customs of certain fees and emoluments for their own use, the fees to arise from certain specified official acts and papers, and the emoluments to arise from a certain specified per centage on all moneys received by them on account of duties on goods imported, and on the tonnage of ships and vessels. And, in addition to the allowances above mentioned, it further provides, that certain collectors (among whom is the collector of the port of Gloucester), shall be annually paid the sum of $250. In another section it further provides, that, when a collector shall die, or resign, the commissions, to which he would have been entitled on the receipt of the duties bonded by him, shall be equally divided between him, or his personal representative, and his successor, whose duty it shall be to collect the same.

It is very clear, that, under this statute all the fees and emoluments (exclusive of the salary, which would be governed by other principles), actually received by any collector, during his continuance in office, would belong to him for his own use, notwithstanding his subsequent removal from office within the same official year. And unless the statute of 1822, ch. 107, has made some different provision, changing this result, it is equally clear, that the United States have no title to demand the balance, which they now seek to recover from Pearce, the collector. We are, therefore, driven to the consideration of this last statute. After having limited, in the 8th section, the emoluments of the collectors of the ports of Boston, New York, Philadelphia, Bal-

timore, Charleston, Savannah, and New Orleans, to a certain sum, the statute proceeds, in the 9th section, to provide, "that whenever the emoluments of any other collectors of the customs shall exceed $3,000, in any one year, after deducting therefrom the necessary expenses incident to his office in the same year, *the excess* shall, in every such case, be paid into the treasury of the United States." Now, in point of fact, Pearce has paid all the excess over the $3,000, received by him in the year 1829, into the treasury for the use of the United States. So that, in a literal sense, he has complied with the very terms of the act.

But the argument for the United States is, that the $3,000 is intended by the statute as the maximum compensation for the services of the collector for the whole year; and that consequently, if he serves only for a part of the year, he is entitled at most only to a compensation *pro ratâ* for the proportionate period, less than a year, of his services. Now, assuming the first branch of the argument to be true in a general sense, there is nothing in the statute, which sustains the latter dependent branch, and authorizes a *pro ratâ* compensation for the services of the collector for a part only of the year. If he is entitled to such compensation, it is, because an equity is superinduced upon the statute, not comprehended by its terms, or its professed objects, but flowing from the general principles of natural justice. On the other hand, if we are to construe the language of the statute according to the natural import of the words, as founded upon, and not superseding the provisions of the same act, there is no necessity for any such superinduced equity. All the fees and commissions, received by the collector, are to be deemed to be received for his own use, until they exceed the maximum amount of three thousand dollars; and the excess only, afterwards received, belongs to the government. So, that until he has received $3,000, whatever he receives is for his own sole use without farther account; and there is not a word in the statute, which justifies the conclusion, that, what he has received

primarily for his own use, is afterwards, by any subsequent events, to be treated as received for the use of the government. The language of the statute forbids any such interpretation. It declares, that the *excess* beyond the maximum amount, and not any portion received below that sum, shall belong to the United States. The right, or trust, attaches, to the excess, and not to the whole sum received.

If the argument be well founded, then, if Pearce had received during his continuance in office only $500, for his salary, fees, and emoluments; and afterward his successor in office had received $2,500 before the close of the same year (1829), Pearce would, nevertheless, have been entitled to one moiety of the $3,000; that is to say, $1,000 beyond the fees and commissions, which accrued during the time, in which he was collector. Such a doctrine has never been maintained in any judicial tribunal; and, I presume, has never yet been asserted by the government. For, in effect, it would be to transfer from the collector for the time being the fees and emoluments, given to him by the very terms of the statute of 1799, ch. 23, to another person, who was not the collector, when those fees and commissions accrued. But, let us put the case a little farther, and suppose, that the new collector, after having thus received $2,500 in the year 1829, should, during the residue of his first official year up to the time when his predecessor was removed, and he was appointed in his stead, have received only $500 more; then he would be entitled, according to the strict terms of the law, to retain the $500 for himself. But, according to the argument, he would be entitled to the $3,000, subject to the deduction of the $1,000 belonging to his predecessor; that is to say, he would be entitled to $2,000 only. Surely this cannot be a safe or just interpretation of the statute.

Again; suppose Pearce, before his removal from office, had received for salary, fees, and commissions $2,500 only. In such a case there would be no excess received by him while in office,

in any one year; and, under such circumstances, the terms of the statute would not reach his case. He would be entitled to retain the $2,500. Why? Because the statute of 1799, ch. 23, the only one, which gives him the right, gives the fees and emoluments to him for his own use, as soon as they accrue.

The truth is, that the statute of 1799, ch. 23, (and in this respect it stands wholly untouched and unrepealed), gives to the collector fees and commissions for certain acts and services performed officially by him, as a compensation therefor. When the services are performed, and not till then, the right attaches; and all that the act of 1822, ch. 107, professes to do, is to limit the aggregate amount of those fees and commissions (together with the fixed salary) to the maximum of $3,000, and to make the excess, received by the collector, a trust fund for the United States. This is the natural and appropriate meaning of the language. But the argument for the United States would give the fees and commissions, in many cases, not to the collector, who performed the services; but to another collector, by whom they had not been performed. And this not only in the case of a vacancy by a voluntary act of the collector, such as his resignation, and the case of a vacancy by inevitable accident, as his death; but also in case of a vacancy occasioned by the direct power of the Executive in removing him from office. So, that the collector, who has borne the burthen, and performed the service, is to yield up his rights, not to the government, as a case of excess, but to his fortunate and unburthened successor. Well might he exclaim in such a case, in the language of the poet, on another occasion, *Sic vos non vobis. Hos feci versiculos; tulit alter honores.*

Besides; in my judgment, the true interpretation of the statute applies, and can apply, in its language only to one and the same collector. The words are, "whenever the emoluments of any other collector shall exceed $3,000 in any one year, the excess shall, in every such case, be paid into the treasury."

The statute does not look to the case of two different collectors within any one year, or join them together for any period of a year. When does the year of any collector begin and end in the sense of the statute? Plainly, in my judgment, it begins on the day of his appointment, and ends with the same day of the succeeding year. It has nothing to do with the beginning or end of the official year of his predecessor, or with that of the calendar year. If the statute meant, what the argument supposes, its language would have been very different. It would have declared, that the emoluments of the collector or collectors of any other port shall not, in the aggregate, exceed in any one year, calculated from the 1st day of January and to the 31st day of December of the same year, the sum of $3,000; and when there shall be more than one collector of the same port in any one year, the emoluments of the whole year shall be apportioned among them *pro ratâ*, according to their respective terms of service. Now, this is the true scope of the argument; and upon the slightest examination it is apparent, that it is not possible, by any straining of language, to bend the words of the statute to such an import. In short, the Court would be making a new statute, instead of construing an old statute, by such an interpretation. I am not bold enough to undertake such an enterprise. It may be, that there would be more wisdom in such a provision, than there is in the existing law (though it may well be doubted). But that is a matter for the consideration of Congress, and not for Courts of Justice.

The case of a commission merchant, who is to receive a compensation for selling goods at a given per centage, not to exceed in the whole a given sum, which has been put by the District Attorney, is certainly very much in point. But it is only changing the actors, and not the drama. It is the argument of *idem ad idem*, resolving itself into the old maxim of antiquity, *Nil agit exemplum litem, quod lite resolvit.*

Upon the whole, my opinion is, that by the statute the col-

lector, who receives, while in office, the fees and emoluments of his office, not exceeding $3,000, is absolutely entitled to them in his own right, whether he continues in office during the whole year or not. The judgment of the District Court is, therefore, affirmed.

United States v. Alfred Cassedy and others.

To sustain an indictment for an endeavor to commit a revolt under the Act of Congress of 1835, ch. 40, § 2, a confederacy or combination must be shewn between two or more of the seamen, to refuse to do further duty on board the ship, and to resist the lawful commands of the officers.

The contract of seamen for the voyage is not suspended or extinguished by the death, removal, or resignation of the original master; but they are bound to perform the voyage under any person, who is lawfully substituted in his stead.

If a person, substituted as master, be grossly incompetent to the duties of his station, from want of skill or bad habits, or profligate and cruel behavior, the seamen may be justified in refusing to do duty, or to remain by the ship.

Indictment for an endeavor to commit a revolt on board of the ship Amethyst, on the high seas, against the Act of 1835, ch. 40, § 2. Plea the general issue.

At the trial it appeared in evidence, that the Amethyst was an American ship, registered in New Bedford. She sailed from thence on a whaling voyage in the Pacific in August 1836, under the command of Capt. Warren Howland. In consequence of ill-health, Capt. Howland was obliged to leave the ship at St. Helena, in January, 1837, and with the advice of the American consul at that port, he appointed the chief mate to the command for the residue of the voyage. The crew, upon receiving information of the substitution of the mate to the command, refused to do any further duty on board, although the mate was expe-

rienced, and they were urged to do so by the consul. On the next day, Capt. Howland and the consul went on board and examined the crew separately. The defendants, Cassedy, Bowditch and Jenkins still persisted in their refusal; and said they did not like to proceed on the voyage, with the mate as master. They were then taken on shore, and put into prison. Two days afterwards the consul, together with two American masters, went on board to persuade the crew to go to sea. The mate, by direction of the consul, ordered the ship to be got under weigh for sea. Half of the crew refused at first; but finally all of them then on board, except the defendants, Allen, King and Hopp consented. These three last were then also sent on shore, and put in prison with the others, who had been put in prison two days before. The ship afterwards proceeded to sea without them; and they were sent home in another American ship, the Octavia, for trial, and arrived at New Bedford.

Story J. In summing up to the jury said: Upon the facts stated in the evidence, which, indeed, is not in its general bearing disputed, the question arises, whether the defendants, or any of them, are guilty of the offence charged in the indictment. And that depends upon another question, whether there was among the defendants, or any two or more of them, a common confederacy or combination to refuse to do further duty on board the ship, and to resist the lawful commands of the officers in regard to the sailing or preparations for the voyage. If there was any such confederacy or combination, or any encouragement by the defendants of each other in such acts of refusal and disobedience, then the offence, in contemplation of law, has been committed, unless some justification of the refusal and disobedience is made out.

The defendants seem to have proceeded upon the ground, that they were not bound to service on board after the original master ceased to be such; and that they were not bound to

serve under the mate, acting as master, under a regular substituted appointment. This is a sheer mistake of the law. The contract of seamen for the voyage is not suspended or extinguished by the original master's ceasing to be such, by death, by removal, by resignation, or otherwise. They are bound to perform the voyage under any person, who is lawfully substituted master for the voyage; for their engagement is, in substance, an engagement with the owners for the voyage, and not with a particular master, so long as he remains such. It is true, that if a person, substituted as master, is grossly incompetent to the duties of his station from want of due skill or from grossly bad habits, or from profligate and cruel behavior, that may furnish a suitable excuse for a refusal to do duty, or to remain by the ship. But such a case must be clearly made out, beyond all reasonable doubt, and it is not to be presumed, or inferred. There is no such proof in the present case; and, therefore, it cannot be insisted on. The evidence, so far as it goes, is decidedly favorable to the competency, skill, and good character of the mate.

The question then resolves itself into a mere question of fact, upon which the jury will pass their opinion.

Verdict against all the Defendants, Guilty.

Mills, District Attorney for United States.

United States v. Otis Taylor.

The Act of Congress of 1835, ch. 40, § 3, for the punishment of certain maritime offences, provides, that "if any master or other officer of an American ship or vessel, &c., shall, from malice, hatred or revenge, and without justifiable cause, beat, wound or imprison, any one or more of the crew of such ship or vessel," &c., he shall be punished in the manner stated in the Act. *Held* that "malice," in the sense of the Act, signified wilfulness, or a wilful intention to do a wrongful act; and, that to authorize a conviction under this Act, two things must be shown, first, malice,

or hatred, or revenge; and secondly, a want of justifiable cause to inflict the injury.

The master, when on board, has generally the sole authority to authorize punishment to be inflicted on any of the crew; and if he is present, when any punishment is inflicted by a subordinate officer, and can prevent it, and does not, he is personally responsible for the act. And neither the mate, nor any subordinate officer, has authority to punish any seaman, even for improper behavior or misconduct to himself personally, when the master is on board, except by the authority, express or implied of the master, or when the necessities of the ship's service require instantaneous punishment, as by blows or otherwise, to compel a seaman to do his duty.

In the absence of the master, the next highest officer on board succeeds to his rights and authority *pro tempore*, so far as they are necessary for the due performance of the ship's duties.

INDICTMENT upon the Statute of 1835, ch. 40, § 3, against the defendant, the master of the American Brig Maria Theresa, for maliciously and without justifiable cause, beating and wounding one John Wilson a seaman, belonging to the same ship. Plea, not guilty.

The cause at the trial turned principally upon matters of fact, and was argued by *J. Mills*, District Attorney, for the United States, and by *A. H. Fiske* and *B. Rand* for the defendant.

STORY J. In summing up to the jury, said: This is the first case, which has come before the Court upon the construction of the recent Act of Congress (Act of 1835, ch. 40), for the punishment of certain maritime offences; and the arguments of counsel and the facts of the case have led us to the consideration, what is the true interpretation of the terms of the act. The third section of the act provides, "That if any master or other officer of an American ship or vessel on the high seas, or on any waters within the admiralty and maritime jurisdiction of the United States, shall, from malice, hatred, or revenge, and without justifiable cause, beat, wound or imprison any one or more of the crew of such ship or vessel," &c. &c., he shall be punished in the manner stated in the act. The question, which arises, is, what is the true meaning of the word "malice," as

used in the act. Does it mean (what is the common popular sense) a brutal malignity of conduct, resulting from bad passions and a wicked and depraved heart, such (to use the language of an eminent judge in speaking of that malice, which constitutes a material ingredient in the crime of murder) as indicates a heart regardless of social duty and fatally bent on mischief.[1] Or does it import only, what, in a general sense, is deemed in law malice, viz. a wilful or wanton intention to do a wrongful act, regardless of or in known violation of duty. The latter is the usual and ordinary sense, in which the word is interpreted in all cases of statutes, and other cases at the common law, in which it constitutes an ingredient in any offence, or tort. In cases of murder, where it has acquired a more intense sense, there is an accompaniment, indicative of its being used in that more intense sense; for in such cases, there must not only be malice, but "malice aforethought." Yet in strictness of law, the term malice by itself, perhaps, has no more than its usual sense in law, even in such cases. Thus, it has been said "If I give a perfect stranger a blow likely to produce death, I do it of malice, because I do it intentionally, and without just cause or excuse."[2] Malice, then, in the true sense of the law, at least in all cases, except that of murder, signifies no more than a wilful intention to do a wrongful act. On one occasion, it was said with pregnant brevity by an English Judge, that malice is wilfulness. On another occasion, where the subject underwent a thorough discussion, it was said, by the Court; "Malice, in common acceptation, means ill will against a person; but in its legal sense, it means a wrongful act, done intentionally, without just cause or excuse."[3] It is plain, that the act of Congress uses the word

[1] Foster's Crown Law, p. 256, 257.

[2] *Bronnage* v. *Prosser*, 4 Barn. & Cresw. R. 255.

[3] *Bronnage* v. *Prosser*, 4 Barn. & Cresw. R. 255. See also 2 Starkie Evid. Malice p. 486, (2d London Edit.) Phillips's Case, 1 Moody Cr. Cas. 264, 273. *Blunt* v. *Little*, 3 Mason R. 102, 104. *Dexter* v. *Spear*, 4

in this last sense, which is its true sense; for the words of the act are, "malice, hatred, or revenge," not malice and hatred, or revenge; thus taking a distinction such as really exists, between the import of the different words; malice indicating the mildest form of wrongful intention, and hatred, or revenge, the more intense form resulting from bad passions, and gross malignity and depravity of heart. If the offence were not punishable, unless there were bad passions in the case, then hatred or revenge would have been the only appropriate words. As the language stands, the word "malice" has a substantial meaning, and covers all cases of intentional wrong, not included in the other words.

The other part of the statute is equally important to be considered. There must be a want of justifiable cause for the beating, as well as the existence of malice, or hatred, or revenge. If the party inflicts the injury, however maliciously; still, if he has a justifiable cause, the statute offence is not committed. Both then must concur to authorize a conviction, first, malice, or hatred, or revenge; and secondly, a want of justifiable cause to inflict the injury.

Verdict Guilty.

In the course of the trial, it appeared, that the mate (who was a witness), had himself also tied up and whipped the same seaman with a cat, as a punishment for his previous misbehavior to himself personally. This was done, when the captain was on board, but without any authority from him. Alluding to this testimony, STORY J. said; The witness has very frankly stated his own acts. But I wish to give him notice, that he has no authority, nor has any subordinate officer, to punish any seaman for his improper behavior and misconduct to him personally,

Mason R. 118. *United States* v. *Ruggles*, 5 Mason R. 192. 1 Russell on Crimes, 422, last London Edit. note. Ibid. p. 614, first Amer. Edit. *United States* v. *Coffin*, 1 Sumner R. 398.

when the master is on board, except by the authority, express or implied, of the master. The master has generally the sole authority when on board, to authorize punishment to be inflicted on any of the crew; and if he is present, when any punishment is inflicted by a subordinate officer, and can prevent it, and does not, he is personally responsible for the act, and by his acquiescence adopts it, as done by his authority. When the master is not on board, of course the next highest officer on board succeeds to his rights and authority *pro tempore*, so far as they are necessary for the due performance of the ship's duties. When I say, however, that the mate or subordinate officer has no authority to inflict punishment on any seaman, when the captain is on board, I do not mean to say, that he has not a right to compel a seaman by blows or other force to do his duty at the time, when the immediate exigency of the service requires it to be done. But that is not so much a punishment for the offence of disobedience, as a necessary means of compelling the performance of duty at the very moment, when it is necessary to enforce prompt and immediate obedience. In many cases, the safety of the ship may require instant obedience to a command (as for example to take in sail), without waiting for any direct authority from the master to compel obedience. But the master cannot delegate to any subordinate officer a general authority to inflict punishment at his own pleasure for any offence of the crew. The authority of any subordinate officer to punish exists only, when it is at the very moment absolutely required by the necessities of the ship's service to compel the performance of duty. The master stands in this respect in the relation of a parent to the seamen, and is bound to exercise his own judgment, as to the time, the manner, and the circumstances, under which punishment is to be inflicted on the crew for any past misdemeanors, or any present misdemeanors, not immediately and materially affecting the ship's service or security.

Certain Logs of Mahogany, Thomas Richardson Claimant and Appellant.

The Admiralty has jurisdiction over charter-parties for foreign voyages, and will enforce the lien thereof.

An objection, grounded on the pendency of another suit, for the same cause of action, is preliminary in its character, and should be taken in Admiralty by a special plea, in the nature of a plea in abatement, known, in the practice of the Admiralty, as a dilatory or declinatory exception.

The objection of *lis pendens* can be sustained only, where the two suits are of the same character, and where the *plaintiff* in both suits is the same.

A suit in a State Court by replevin, or by an attachment of the property in question, cannot supersede the right of a Court of Admiralty to proceed by a suit *in rem*, to enforce a right or lien against that property.

The general owner of a ship will be deemed owner for the voyage, notwithstanding a charter-party, if he retains the possession and control of the navigation of the ship during the voyage, and if the master is his agent, acting under his instructions. So also, if the intention of the parties, with regard to this point, seems doubtful on the face of the charter-party.

The lien on the cargo for freight is recognised by the common law and maritime law; but it may be displaced by particular circumstances, which denote a clear and determinate abandonment.

A clause in a charter-party, providing, that the freight shall be paid "in five days after her [the Brig's] return to and *discharge* in Boston" is not a waiver or displacement of the lien for freight; the word "*discharge*" merely referring to the unlading, and not to the delivery of the cargo.

Semble. A shipper has a right, by the maritime law, to examine the goods after they are unlivered, in order to ascertain, whether they are damaged or not, before he makes himself liable at all events for the frieght.

Where by the charter-party the freight was a gross sum payable on the successful close of the whole voyage, and the bill of lading declared, that the return cargo should be delivered to the shipper or his assigns, they paying freight, as per charter-party; *Held*, that a lien attached to the homeward cargo for the freight due from the whole voyage; also, that the consignee by his receipt of the goods, became personally liable, upon his implied assumpsit, for the whole freight.

This was the case of a libel *in rem* brought against a certain cargo, consisting principally of mahogany, claimed by the respondent and laden on board of the brig Sterling, owned by the libellants, to recover the amount of the freight due and earned on a foreign voyage under a charter-party, which, as the

libellants contended, gave them, under all the circumstances, a lien on the same cargo for the amount of such freight, which they were entitled to enforce in the present proceeding.

The charter-party was entered into on the 18th of October, 1836, a Boston, between G. P. Richardson, as agent and owner of the brig, with Thomas N. French, for a voyage from Boston to port or ports in the West Indies, from thence to the city of St. Domingo and back to Boston (no exceeding three ports used in all), where she was to be discharged, the dangers of the seas excepted. After the outward cargo was taken on board and before the brig sailed on the voyage French failed in business, and the cargo (which was shipped on his account), was attached by French's creditors. It was then agreed between French and the respondent, that he should relieve the cargo from the attachments, and that for his indemnification he should have the control and management of the cargo, during the voyage, and that the homeward cargo should be shipped and consigned to the respondent by the firm of Joseph Mansfield & Co. (which firm the supercargo, who had been previously appointed such by French, was a member), who were the consignees of the outward cargo. The written instructions for the voyage were given by G. P. Richardson for the owner, and were approved by the respondent. By the bill of lading of the outward cargo it was deliverable to Mansfield & Co. or to assigns, "he or they paying freight for the goods as per charter-party." The voyage was duly performed and the homeward cargo was shipped by Mansfield & Co., and by the terms of the bill of lading was made deliverable "to the order of the shippers or assigns, he or they paying freight as per charter-party;" and the bill of lading was afterwards sent endorsed by the shippers to the respondent. It was, under this consignment, made in pursuance of the original agreement with French, that the respondent claimed the homeward cargo for his indemnification for debts and liabilities exceeding its full value.

Upon the arrival of the brig at Boston the libellants gave no-

tice to the respondent, that they were ready to deliver the cargo to him upon his payment, or upon security for payment, of the freight due by the charter-party; otherwise they should proceed to discharge the cargo and detain the same until the expiration of five days from the discharge, and then take such steps as they should be advised in the law to obtain the charter money. The respondent, upon receiving the notice, declined to accede to the terms. The cargo was accordingly landed and put into the possession of Mr. Mackay, a wharfinger, as bailee for the libellants. The respondent immediately afterwards brought a writ of replevin, which was sued out of the state court by the respondent, against the wharfinger under which the cargo was replevied; and, the five days having expired, the present libel was filed against the cargo and the same was taken into the possession of the marshal, and afterwards delivered to the respondents, upon giving bail according to the course in the Admiralty.

Upon the answer and proofs a decree was rendered by the District Judge in favor of the libellants, and an appeal was taken from that decree by the claimant and respondent.

The cause was argued upon the appeal by *C. P.* and *B. R. Curtis* for the libellants, and by *Henry H. Fuller* for the claimant and respondent.

Story J. The answer of the respondent insists upon various grounds. In the first place, that the Court, sitting in Admiralty, has no jurisdiction over the case. But since the decision of this Court in the case of *The Volunteer* (1 Sumner R. 551), the objection would be deemed unmaintainable; and it has now been waived at the argument. In the next place, the respondent relies on the pendency of the replevin suit, as a good defence against the libel, as it is substantially, as he contends, for the same cause of action; and the parties are not to be harassed with successive suits upon the same cause of action at the same time. To this objection several answers may be

given, each of which is equally conclusive against it. (1.) The objection is in its own nature a mere declinatory or dilatory objection in the nature of a plea in abatement; and not peremptory, as a bar on the merits. It being preliminary in its character it should have been taken, if at all, by a special plea in the nature of a plea in abatement, known in the practice of the Ecclesiastical and Admiralty Courts by the appellation of a dilatory or declinatory exception, which is always brought forward before the *contestatio litis*, or general defence in bar, or general answer upon the merits.[1] (2.) But, if this could be overcome, there is another objection to it, founded upon the different character of the two suits. The parties to the replevin are not the same, as in the present suit. The wharfinger is the sole defendant in that suit, and he is no party to the present suit. Then, again, the suits are not of the same nature; the replevin is founded upon a supposed tort; the libel upon a supposed contract. It is possible, nay it is probable, that many questions of the same nature may arise in each suit. But it never can be judicially affirmed, that all the questions in a suit founded in tort, and in the one founded in contract are, or must necessarily be the same; and that no others can arise. Then, again, the replevin, though in form *in rem*, acts *in personam* as to the judgment. But the libel is solely and exclusively *in rem*. The replevin is founded on the right of property in the thing. The libel insists upon no property, but upon a mere lien. (3.) Then, again, a suit in a State Court by replevin, or by an attachment under process, of the property, can never be admitted to supersede the right of a Court of Admiralty to proceed by a suit *in rem* to enforce a right against that property to whomsoever it may belong. The Admiralty suit does not attempt to enter into any conflict with the State Court, as to the just operation of its own process; but it merely asserts a paramount right against all per-

[1] See 1 Brown Civil and Adm. Law, 464 to 470. 2 Brown Civil and Adm. Law, 361 to 369. Id. 414, 415, Law on Forms of Eccles. Law, tit. 78, p. 167 to tit. 81, p. 170.

sons whatever, whether claiming above or under that process. No doubt can exist, that a ship may be seized under admiralty process for a forfeiture, notwithstanding a prior replevin or attachment of the ship then pending. The same thing is true as to the lien on a ship for seamen's wages or a bottomry bond. 3. But if this objection also could be overcome, there is another entirely fatal; and that is, that the plea of a prior *lis pendens* applies exclusively to the case, where the plaintiff in both suits is the same, and both are commenced by himself; and not to cases, where there are cross suits by a plaintiff in one suit, who is defendant in the other. The slightest examination of the doctrines of the common law on this subject will satisfactorily establish the conclusiveness of this objection to the exception. (See Bac. Abridg. Abatement, M.; Sparry's case 5 Co. R. 61; Com. Dig. Abatement H. 24). I might add, that if the respondent had originally commenced a suit in the Admiralty for the supposed tort, and afterwards for the same cause of action had sued out a replevin in the State Court, upon the principles decided in the case of *Dudfield* v. *Warden* (Fitzgibbon R. 313) if applicable to our Courts, the *lis pendens* in the Admiralty could not in the State Court have been urged as an objection to the replevin. In every view of the matter then, this exception is untenable.

We come, then, to the main or substantial ground of controversy upon the merits; and that is, whether there is a lien upon these goods for the freight earned. If there be, I have no doubt, that it is within the competency of the District Court, as a Court of Admiralty, to enforce it upon the principles stated in the case of *The Volunteer* (1 Sumner R. 551), and what I cannot but deem the ancient and legitimate jurisdiction of the Admiralty.

Let us proceed at once, then, to the question of the lien. That there is generally a lien on the cargo for the freight, is not disputed; and indeed, it is equally acknowledged in the common law, and in the maritime law, as is abundantly shown in

the authors cited in *The Volunteer* (1 Sumner R. 569, 570). If, then, the circumstances of the present case do not displace that lien, it must be treated as a subsisting lien. And I accede to the argument urged at the bar, that the *onus probandi* is on the respondent to establish a waiver, or extinguishment of the lien. Three grounds have been relied on for this purpose. 1. That by the charter-party, French, the charterer, became owner for the voyage. 2. That if not, the terms of the charter-party are repugnant to the notion of any existing lien, as the freight is not to be paid until after a contemplated delivery of the cargo to the respondent. 3. That at all events the homeward cargo is not liable for the freight due for the whole voyage; and, at most, only for the freight due on that cargo in the return voyage.

In the first place, then, was French, the charterer, upon the true interpretation of the charter-party, owner for the voyage? I shall not attempt to go over the authorities on this subject, since they are fully collected and their result stated in the case of *The Volunteer* (1 Sumner R. 551), to which, therefore, I take leave generally to refer. There are two decisions, however, to which I wish especially to refer, the one English, the other American. In the case of *Colvin* v. *Newberry* (6 Bligh R. (N. S.) 189), Lord *Tenterden*, in moving for an affirmance of a judgment in the Exchequer Chamber upon the question, who is to be deemed owner for the voyage (and which judgment reversed his own in the King's Bench), used the following language: "Two propositions of law are clear, as applicable to a case like the present. The first is the common case of goods shipped on board of a vessel, of which the shipment is acknowledged by a bill of lading, signed by the master, that, if the goods are not delivered the shipper has a right to maintain an action against the owner of the ship. The other proposition, which is equally clear, is this; that if the person, in whom the absolute property of the ship is vested, charters that ship to another for

a particular voyage, although the absolute owner appoints the master and crew, and finds provisions, and every thing else, and is to receive from the charterer of the ship a certain sum of money for the use and hire of the ship, an action can be brought only against the person, to whom the absolute owner has chartered the ship, and who is considered the owner *pro tempore*, that is, during the voyage, for which the ship is chartered. In such a case the action cannot be maintained against the person, who has let out the ship on charter, namely the absolute owner." So that, according to this decision, the fact, that the absolute owner appoints the master and crew, and finds provisions for the voyage, will not alone control the other words, if there is by them a clear letting to charter of the whole ship; but the charterer will be deemed the owner for the voyage. On the other hand, the Supreme Court of the United States, in the case of *Marcardier* v. *The Chesapeake Insurance Company* (8 Cranch, 49), where the same question arose, used the following language: "A person may be owner for the voyage, who, by a contract with the general owner, hires the ship for the voyage, and has the exclusive possession, command, and navigation of the ship. But where the general owner retains the possession, command, and navigation of the ship, and contracts to carry a cargo on freight, the charter-party is considered as a mere affreightment, sounding in covenant, and the freighter is not clothed with the character or legal responsibility of ownership." Perhaps, there is no real discrepancy between the doctrines held in each of these cases; and, with reference to the facts, each may be perfectly correct. In the former case the master was the charterer, and not the absolute owner. In the latter the master was the absolute owner, and entered into the charter-party, he being to continue master during the voyage. The charter-parties too contained very different and special provisions. In the former case, although there were no express words of demise, yet the Court thought, that, upon the whole terms of the instru-

ment, taken together, there was in effect a letting of the whole ship to the master for the voyage, notwithstanding she was to be victualled and manned at the expense of the absolute owner. But, if there be any real discrepancy between these cases, I have no difficulty, independently of my official duty, to obey the decisions of the Supreme Court, in saying, that I deem the American decision built upon the more solid and satisfactory distinction. I agree, that it is not indispensable, to constitute the charterer the owner for the voyage, that express terms of demise and letting of the whole ship should appear on the face of the charter-party; but that it may be gathered, as a result, from the whole stipulations in the instrument. I also agree, that the clause, that the absolute owner shall appoint the master and crew, and victual, and provision, and equip the ship during the voyage, is not of itself necessarily conclusive, that he retains the ownership during the voyage; and that the provision is controllable by other stipulations, showing a clear intention, that the charterer shall be owner for the voyage. But I do consider such a stipulation, as very strong *primâ facie* evidence in favor of the absolute owner, that he is deemed to be the owner for the voyage, and that it will require very cogent circumstances to overcome it. In short, it appears to me, that, if the absolute owner does retain the possession, command, and control of the navigation of the ship during the voyage, and the master is deemed his agent, acting under his instructions for the voyage, though authorized and required to fulfil the terms of the charter-party, the absolute owner must, under such circumstances, be still deemed owner for the voyage, and be liable as such to all persons, who do not contract personally and exclusively with the charterer by a sub-contract with the latter, knowing his rights and character under the charter-party. This seems to me the natural, and, indeed, the necessary result of the doctrine stated in *Marcardier* v. *The Chesapeake Insurance Company* (8 Cranch. R. 49), and *McIntyre* v. *Browne* (1 John. R. 229), and *Gracie* v. *Palmer* (8 Wheat.

R. 632, 633; S. C. 4 Wash. Cir. R. 110). The same view of this subject is taken by Mr. Chancellor *Kent* in his very learned Commentaries;[1] and it stands confirmed by the decision in *Taggart* v. *Loring*, 16 Mass. R. 336; and in *Clarkson* v. *Edes*, 4 Cowen R. 478. My brother, the late Mr. Justice *Washington*, in his excellent opinion in the case of *Gracie* v. *Palmer*, has collected the main authorities, and commented on the true results to be deduced from them with his usual clearness and accuracy; and the Supreme Court on the appeal supported and approved his opinion. So that, whatever of minute differences or distinctions or discrepancies are to be found in the English cases on this subject, in America there is a general uniformity of decision upon the principles and distinctions already stated.

Let us now proceed to the consideration of the terms of the present charter-party, in order to ascertain, what is their true meaning and interpretation. If, upon comparing the various clauses, we are led to the conclusion, that it is doubtful, whether the charterer was intended to have the sole possession and control of the brig during the voyage, or to be constituted owner for the voyage, then the general owner must be deemed such; for his rights and authorities over the voyage must continue, unless displaced by some clear and determinate transfer of them. The charter-party purports to be between George P. Richardson, as agent and owner of the brig Sterling, of which one Treat was the master, and Thomas A. French; and witnesseth, that Richardson, for the consideration thereinafter mentioned, "hath letten to freight all the aforesaid brig, with the appurtenances to her belonging, for a voyage to be made from Boston to port or ports in the West Indies; from thence to the city of St. Do-

[1] See 3 Kent Comm. Lect. 45, p. 137, 138, 3d edit. 1836. See also Abbott on Shipp. by Story, 1829, p. 22, and note. Id. 172 to 176. *Christie* v. *Lewis*, 2 Brod. and Bing. 410.

mingo, and back to Boston, not exceeding three ports used in all, when she is to be discharged, the dangers of the seas excepted." It then proceeds to state, that Richardson covenants, that the brig shall be tight, staunch, and strong, and apparalled during the voyage; that it shall be lawful for French, his agents and factors, as well at one place as at another, to load on board of the brig a full loading of goods and merchandise, as they shall think proper, contraband goods excepted. In consideration thereof, French agrees to pay in full for freight or hire of the brig, "the sum of six hundred and fifty dollars per calendar month, payable in five days after her return to and *discharge* in Boston." Richardson further agrees "to pay the charge of victualling and manning the brig," and French "to pay all lighterage, port charges, and pilotage during the voyage, and *to deliver said brig, on her return to Boston, to the owner aforesaid or his order.*" Then follows this clause: "It is understood, that one passenger in cabin the character has the liberty of putting in, he finding his own small stores. The charterer to load the vessel at Boston, and the owner to discharge the cargo on her return. Should any funds be required for disbursements in a foreign port, to be advanced the captain on account of the charter." The parties then bind themselves for the true and faithful performance of their covenants and agreements in the penal sum of two thousand dollars.

Such are all the material clauses in the charter-party. And it must be admitted, that they are somewhat indeterminate in their nature and character, so far as they affect the ownership for the voyage. The language in the beginning imports a present demise of the ship for the voyage. It is, that the owner lets to freight the brig for the voyage. But this does not necessarily import, that the possession is given up to, and taken by the charterer. Whether so intended, or so by operation of law, will essentially depend upon all the terms of the instrument taken together. This is very clearly established by the deci-

sions cited by Lord *Tenterden* in his excellent treatise on Shipping (Abbott on Shipp. P. 3, ch. 1, § 6, p. 173—178). On the other hand, the clause of covenant by the owner (who had appointed the master), that the ship should be tight, &c., and that he should pay for the victualling and manning during the voyage, is not necessarily decisive (as has been already intimated) the other way. The clause, that the charterer should have the liberty of putting a passenger on board in the cabin, does, indeed, favor the construction, that the owner was to retain the possession of the brig by his master during the voyage. So also the clause, that the owner should discharge the cargo on the brig's return to Boston. On the other hand, the clause, that the charterer should deliver the brig on her return to Boston, to the owner or his order, does strongly imply, that the charterer was to have possession during the voyage up to that time. So that, from the obscurity of the phrases, and the apparent contradictory presumptions arising from these various clauses, it is really somewhat difficult to say, what was the absolute intention of the parties. And, then, upon the doctrine already stated, on the footing of the doubt what the parties did intend, the owner must be deemed to continue owner for the voyage. It is not an unimportant circumstance, also, in the actual posture of the case, that the acts of the parties under the charter-party conform to this view of the matter, and put this construction upon it. It distinctly appears, that the sole instructions for the voyage were given by the owner, and not by the charterer; and that the respondent acquiesced in what the owner assumed to be his right and duty, the giving of the orders for the whole voyage to the master, as his agent, without any interference by the charterer.

But it appears to me the less necessary to decide the case on this point, because, it is manifest, that the owner, and not the charterer, was to have the possession of the brig immediately on her return to Boston, and was, as owner, to discharge the cargo;

and the freight was not payable until five days after such discharge. So that, in the most unfavorable aspect of the case for the owner, the possession of the brig and cargo were to be in him upon the brig's arrival at Boston, and he was to discharge the cargo. And thus his possession became coupled with his lien for the freight, if it existed, in the same way and to the same extent, as if he had had possession of both during the whole voyage.

We are, therefore, led to the consideration of the second point already stated; and that is, whether there was, under the circumstances, a lien on the homeward cargo for the freight. That there was such a lien, unless waived or displaced by the agreement of the parties, has been already affirmed; and, indeed, is upon principle, as well as upon authority, incontrovertible. The clause, in the charter-party, relied upon by the respondent as a waiver or displacement of the lien, is that, which provides, that the freight shall be paid "in five days after her (the brig's) return to and *discharge* in Boston." The argument of the respondent is, that, by the word "discharge," as here used, is meant, not an unlivery or unlading merely of the cargo, but a delivery of the same to the charterer, or owner of the cargo. The argument on the other side is, that by the word "discharge" is meant a mere unlading or unlivery from the brig, without any reference to a delivery to the owner. And, certainly, in a general sense, as well as in a nautical sense, the proper meaning of the word "discharge," with reference to a cargo, is to unlade it from the ship. So it will be found stated in Johnson's Dictionary, and Falconer's Marine Dictionary. The word, therefore, in its appropriate sense, being perfectly significant in the place, where it occurs, that meaning is not to be departed from, unless a different use of it is manifestly intended in the clause in question. I see no reason for any such construction. On the contrary, it seems to me, that the appropriate sense is here, as matter of intention, to be presumed from the cir-

cumstances, rather than any wider or different sense. It is well known, that the goods of the shipper may not only be detained for freight, properly so called, but also for the hire agreed to be paid by the shipper under a charter-party for the use of the ship, if the owner of the ship retains possession of the cargo; and that the shipper cannot ordinarily insist on a delivery of the goods to him, until the freight or hire is paid or secured, according to the terms of the agreement.[1] But, then, the owner is not at liberty to insist, that the goods shall not be landed before such payment or security is made. On the contrary, the shipper has a right, as it should seem, by the maritime law, to insist upon examining the goods, after they are unlivered, in order to ascertain, whether they are damaged or not, before he makes himself liable at all events for the freight. Under such circumstances, an unlivery of the cargo becomes perfectly proper; and after it is made, the owner of the ship has a right to detain it in his custody, until the payment of or security for the freight. So the law is laid down in Lord *Tenterden's* Treatise on Shipping (Abbott on Shipping, P. 3, ch. 3, § 11, pp. 247, 248); and it appears to be the general rule adopted by foreign maritime nations. In the Marine Ordinance of Louis XIV. (1 Valin. lib. iii. tit. 3, art. 21, p. 665), it is expressly prescribed, that the master shall not retain the merchandise on board his vessel for default of payment of the freight. But he may, at the time of the discharge, refuse to deliver it, or cause it to be held for the freight. Valin gives, as the reason, that it would be absurd to allow the master to insist upon the payment of his freight before the goods were examined, and the damage, if any, ascertained. The modern Code of Commerce of France (lib. ii. tit. 8, art. 306), contains a provision very similar in its purport and objects. It declares, that the master shall not retain the merchandise on

[1] See Abbott on Shipping, P. 3, ch. 1, § 7, p. 168. Id. ch. 3, p. 246, 247.

board of his ship for default of the payment of freight. But he may, at the time of discharging, insist upon having them deposited in the hands of a third person, until the freight is paid. The commentators give the same reason for this provision, which is assigned by Valin.[1]

Now, I cannot but think, that the very object of the clause, that the brig should be delivered to the owner on her return to Boston, and that he should discharge her, was intended to fasten his lien for the freight or hire under the charter-party, by enabling him to discharge the cargo, and retain it, until the freight was paid. At least, this is a natural explanation of the object of the clause, which, in any other view, would seem either superfluous or of little legal importance. It is not at all improbable, that the commercial embarrassments of French were suspected at the time, when the charter-party was entered into. But, at all events, his known failure at the time, when the cargo shipped was put under the control of the respondent, and the owner's agreeing to allow the brig to go the voyage, without any farther security than that derived under the original charter-party, favor this construction, especially as it appears, from Capt. Treat's testimony, that there had been some objections made by the owner to proceeding on the voyage; and in reply to a suggestion made by the respondent, the owner said, "that there was no need of any misunderstanding; that he was willing, that the brig should go the voyage, provided they would pay him for it." This was said in the presence of the respondent, of French, and of Mansfield, the supercargo. So that the demur about proceeding on the voyage seems to have been occasioned by French's failure, and the consequent arrangements made with the respondent. It seems to me in a high degree improbable, that the diffi-

[1] See Boucher Instit. de Droit Marit. (1803). Santayra Code de Comm. art. 306, note. Locré, Esprit du Code de Comm. art. 306, note (Lucré. vol. ii. p. 211). Pardessus Droit Comm. P. 3, tit. 4, ch. 2, art. 719.

culty about the freight could have been overcome without some collateral security, if it had not been already well understood by all the parties, that the cargo then on board was, and by the arrangements made, the homeward cargo also, would be, subject to the lien for the freight. It would be so subject, if the discharge of the cargo, referred to in the charter-party, was construed to be a mere unlading thereof, and not an unconditional delivery to the consignee or respondent. The bill of lading for the homeward voyage does, in my judgment, greatly fortify this interpretation of the understanding of the parties. By the terms of it, the homeward cargo was to be delivered at Boston, the dangers of the seas only excepted, "unto the order of the shippers or assigns, he or they paying freight for the said goods as per charter-party." By the very terms of the instrument, then, the delivery was not to be, until the freight was paid according to the provisions in the charter-party, that is to say, "in five days after (the brig's) return to and discharge in Boston." The natural interpretation of this language, taken together, is, that the shipper or his assigns will pay the freight or hire in five days after the cargo is unladen by the owner, if the latter will, at the time of the payment deliver the cargo to the shipper or his assigns. In this way, all the words in the charter-party and the bill of lading have their usual and appropriate meaning. But if "discharge" means delivery, there will be, at least, a seeming repugnancy between the two instruments. By the bill of lading, the payment of freight is to be a contemporaneous act with the delivery; but by the charter-party, it is to be five days after the delivery. I am aware, that this repugnancy may be avoided, or at least mitigated, by construing the words, that when the cargo is delivered, the payment of freight shall be in five days after such delivery. But this construction is less consonant to the just import of the words, and would defeat the right of the owner to any lien for freight; a lien, which is favored in law, and ought not to be displaced without a clear and determinate abandonment of it.

Then, as to the remaining point, to what extent the homeward cargo is liable for the freight or hire. The argument is, that the homeward cargo (if at all) is not liable for any freight beyond what accrued and is properly due from itself for the return voyage; and, therefore, the freight must be apportioned. I am of a different opinion. By this charter-party, the freight or hire was a gross sum, payable on the successful close of the whole voyage. The bill of lading declares, that the return cargo shall be delivered to the shipper or his assigns, they paying freight as per charter-party. The shipper and his assigns, therefore, agree to pay the whole freight, for the whole voyage, upon the delivery of the cargo to them, according to the terms of the bill of lading; and I am unable to see, upon what grounds they can escape the obligations of their own contract. It is common learning, that where goods are consigned to a party, he paying the freight stipulated in the bill of lading, the consignee, by receiving the goods, is bound to pay the freight; and the law charges him upon his implied promise to pay it. In this view of the matter, if there were no lien at all, still the respondent would, upon clear principles of law, be personally liable for the payment of the whole freight or hire due by the charter-party, upon his receipt of the goods, upon his implied undertaking, even if he were now to be treated as the absolute owner of them. But, so far as the transactions between him and French are disclosed, he seems to stand as a mere substitute of French, and as holding the title of the goods under him, as security for debts and liabilities incurred by him for French, and not as absolute owner; and *a fortiori* in such a case he is bound to pay, what French would be bound to pay, since he must accept the goods *cum onere*. On this account I have not been able to perceive upon what substantial grounds the respondent can rest his present defence: for if he should succeed here, he would still remain bound to pay the full freight of the voyage upon his implied assumpsit as consignee. It would, therefore (as was

said by a great Judge, on another occasion), only be changing postures on an uneasy bed. It seems to me, that on this part of the case the decisions in *Faith* v. *The East India Company* (4 Barn. & Ald. R. 629), and *Small* v. *Moates* (9 Bing. R. 574), have a very strong bearing.

Upon the whole, my opinion is, that there is a lien for the whole freight or hire, due under the charter-party, on the return cargo; and, therefore, the decree of the District Court is affirmed, with costs.

JOSEPH GASS IN EQUITY *v.* ABNER P. STINSON.

If a cause, by an interlocutory decree, has been referred to the Master, and either party desires to take the testimony of witnesses, in order to establish the incompetency of a witness, who has already been examined in the cause, and whose deposition was before the Court, when the decretal order was passed, the application to the Master must be by petition in writing, verified by affidavit.

If the application be founded on a suggestion, which is incorrect, in point of fact, the order to take the testimony, which was made thereon, will be superseded.

A party will not be allowed to give oral testimony to the contents or purport of an indictment, verdict or judgment; as the best evidence is the original paper or a certified copy.

If a party would object to the competency or credibility of a witness in Courts of Equity, he must make a special application by petition to the Court for liberty to exhibit articles, stating the facts and objections to the witness, and praying leave to examine other witnesses to establish the allegations in the articles by suitable proofs; and upon this petition, leave is ordinarily granted by the Court.

Semble, that the application may be made by motion, upon the foundation of ignorance at the time of the examination.

An objection to the *competency* of a witness cannot be made after publication, if the incompetency was known before the commission to take his deposition issued.

An objection to the *credibility* of a witness may be ordinarily made after publication and before hearing; but the interrogatories must be so shaped, as to prevent the party, under color of an examination to credit, from procuring testimony to overcome that already taken and published in the cause.

In the United States the usual questions asked, in order to discredit a witness, are; what is the witness's general reputation for truth? is it good or bad?

After the hearing and an interlocutory decree, a party cannot object before the Master to the credibility of a witness, whose testimony was read at the hearing without objection.

Quære, If a party, who cross-examines a witness, knowing his interest, does not thereby waive all right of objection.

A witness, who has given his deposition, which has been read at the hearing, cannot be examined anew before the Master, without a special order of the Court.

THIS cause being before the Master, under the decretal order already passed (S. C. ante 453), an application was made to the Master orally, by the defendant's counsel, to take the testimony of certain witnesses, the object of which was to establish the incompetency of one Noah James as a witness, who had been examined in the cause, and whose deposition was before the Court, when the decretal order was passed. The ground of the application was, that James had been convicted of larceny; that the defendant's counsel knew it before the hearing of the cause; but he then supposed, that the witness, James, had been pardoned; and that he had since ascertained, that James had not received a full pardon, so as to restore his competency as a witness. The Master certified the foregoing facts to *Story* J. at Chambers, and also that under these circumstances he was of opinion, that the purposes of justice required, that the proposed testimony should be taken, *de bene esse*, saving all the rights of the plaintiff to object to the same. An order was accordingly made by *Story* J. at Chambers, to take the depositions of the witnesses under a commission, *de bene esse*, saving the rights of the plaintiff, after due notice to the plaintiff. The depositions had not as yet been taken under the commission, and a motion on petition was now made in open court by the plaintiff to supersede the order thus made.

B. Rand for the plaintiff; *W. C. Aylwin*, for the defendant.

STORY J. As the original application to the Master was made orally, the precise grounds on which it was made do not appear, except from the Master's certificate. This was a great irregularity; and the application should have been by petition in writing, verified (if not ordinarily, at least in a case of this sort), by affidavit.[1] The irregularity, however, was not then brought to my notice. The interrogatories, proposed to be put to the witnesses, were, however, filed in writing before the Master; and an exception has now been taken to their purport and character. I shall presently have occasion to comment on them.

The application to supersede the order relies upon various grounds. The first one is, that the application was founded upon a suggestion, which is wholly incorrect, to wit, that James had not received a plenary pardon; whereas in fact he had received such a pardon, as appears by a copy of the instrument of pardon. This removes at once the whole of the original ground of the application, and undoubtedly entitles the plaintiff to have the order for taking the depositions superseded, since the witness was clearly competent.

But an attempt has been made to sustain the order upon the ground, that the facts to be stated by the witnesses would go to affect the credibility of James. Upon looking into the interrogatories filed, it is impossible that they can be sustained for this or any other purpose, applicable to the cause. The first three interrogatories are merely introductory, and point solely to the identification of James; and in other respects, are immaterial and irrelevant. All the other interrogatories seek to establish by the parol evidence of witnesses, that there was an indictment, trial, conviction, and sentence of James for larceny; facts, which should be proved by a production of the record itself, and which are not, in their character, proper to be established by the mere oral statements of witnesses. There is no ground, upon which

[1] See *Troup* v. *Sherwood*, 3 John. Ch. R. 558, 566.

a party can be permitted to testify orally to the contents or purport of an indictment, or verdict, or judgment; for the best evidence is the original paper, or a certified copy. So that if the interrogatories had been originally examined, they must have been suppressed, whether they applied to competency or to credibility.

But it is proper to say a few words, as to the time and manner of presenting objections to the competency or credibility of witnesses in Courts of Equity. The general course of practice is, that, after publication has passed of the depositions (though it may be before), if either party would object to the competency or credibility of the witnesses, whose depositions are introduced on the other side, he must make a special application by petition to the Court for liberty to exhibit articles, stating the facts and objections to the witnesses, and praying leave to examine other witnesses to establish the truth of the allegations in the articles by suitable proofs.[1] Without such special order, no such examination can take place; and this has been the settled rule, ever since Lord Bacon promulgated it in his Ordinances. (Ord. 72).[2] Upon such a petition to file articles, leave is ordinarily granted by the Court, as of course, unless there are special circumstances to prevent it. There is a difference, however, between objections taken to the competency, and those taken to the credibility of witnesses. Where the objection is to competency, the Court will not grant the application after publication of the testimony, if the incompetency of the witness was known before the commission to take his deposition was issued; for an interrogatory might then have been put to him, directly on the point. But, if the objection was not then known, the Court will grant the application.[3] This was the doctrine asserted by Lord Hardwicke

[1] 1 Harris. Ch. Pr. by Newland, p. 282, 283. Hinde's Pr. Ch. 374, 375. 1 Newl. Ch. Pr. 289, 290. Gilb. For. Roman. 147, 148.

[2] Beames's Ordin. in Ch. p. 32, 187. *Mill* v. *Mill*, 12 Ves. 406.

[3] 1 Harris. Ch. Pr. by Newland, 282, 283. 1 Newl. Ch. Pr. 289, 290,

in *Callaghan* v. *Rochfort* (3 Atk. R. 643), and it has been constantly adhered to ever since.[1] The proper mode, indeed, of making the application in such case seems to have been thought by the same great judge to be, not by exhibiting articles; but by motion for leave to examine the matter, upon the foundation of ignorance at the time of the examination.[2] But upon principle there does not seem to be any objection to either course; though the exhibition of articles would seem to be more formal, and, perhaps, after all, more convenient and certain in its results.

But where the objection is to credibility, articles will ordinarily be allowed to be filed by the Court upon petition, without affidavit, after publication.[3] The reason for the difference, is said by Lord *Hardwicke* (in *Callaghan* v. *Rochfort*, 3 Atk. R. 643) to be, because the matters examined to in such cases are not material to the merits of the cause, but only relative to the character of the witnesses. And, indeed, until after publication has passed, it cannot be known what matters the witnesses have testified to; and, therefore, whether there was any necessity of examining any witnesses to their credit.[4] This latter is the stronger ground; and it is confirmed by what fell from the Court in *Purcell* v. *McNamara* (8 Ves. R. 324).

When the examination is allowed to credibility only, the interrogatories are confined to general interrogatories as to credit, or to such particular facts only, as are not material to what is already in issue in the cause. The qualification in the latter case, (which case seems allowed only to impugn the witness's state-

---

291. Hinde's Ch. Pr. 374, 375. *Purcell* v. *McNamara*, 8 Ves. 324. *Vaughan* v. *Worrall*, 2 Madd. Ch. Pr. 322. S. C. 2 Swanst. R. 400.

[1] See *Purcell* v. *McNamara*, 8 Ves. 324. *Vaughan* v. *Worrall*, 2 Madd. Ch. Pr. 322.

[2] Ibid.

[3] *Watmore* v. *Dickinson*, 2 Ves. & Beam. 267.

[4] *Russel* v. *Atkinson*, 2 Dick. R. 532.

ments, as to collateral facts), is to prevent the party, under color of an examination to credit, from procuring testimony to overcome the testimony already taken in the cause, and published, in violation of the fundamental principle of the Court, which does not allow any new evidence of the facts in issue after publication. The rule and the reasons of it are fully expounded in *Purcell* v. *McNamara* (8 Ves. R. 324, 326), *Wood* v. *Hammerton*, (9 Ves. R. 145), *Carlos* v. *Brock* (10 Ves. R. 49, 50), and *White* v. *Fussell* (1 Ves. & Beam. R. 151).[1] It was recognised and enforced by Mr. Chancellor *Kent*, in *Troup* v. *Sherwood*, (3 John. Ch. R. 558, 562 to 565). When the examination is to general credit, the course, in England is, to ask the question of the witnesses, whether they would believe the party sought to be discredited upon his oath.[2] With us the more usual course is to discredit the party by an inquiry, what his general reputation for truth is, whether it is good or whether it is bad.

But examinations to the credit of witnesses are required to be made before the hearing; and it is quite too late to make the application after the hearing, and *à fortiori* after an interlocutory decree has passed upon the hearing, upon the footing of the evidence in the cause. So the doctrine was laid down by Lord *Eldon* in *White* v. *Fussell* (1 Ves. & Beam. R. 151). The case of *Piggott* v. *Croxhall* (1 Sim. & Stu. R. 467) manifestly implies the same doctrine; though the application was there made before the hearing. It seems to me, therefore, that upon this ground alone, the defendant is not now at liberty to examine witnesses before the Master, to the credit of a person, whose

[1] The very form of the order, is given in a note (*g*) to *Watmore* v. *Dickinson*, 2 Ves. & Beam. R. 268. See also 1 Madd. Ch. Pr. 320 to 325. *Piggott* v. *Croxhall*, 1 Sim. & Stu. 467.

[2] See *Purcell* v. *McNamara*, 8 Ves. R. 324. *Carlos* v. *Brock*, 10 Ves. R. 49, 50. Anon. 3 Ves. & Beam. R. 93. *Watmore* v. *Dickinson*, 2 Ves. & Beam. R. 267. But See *Gill* v. *Watson*, 3 Atk. 522.

testimony was read at the hearing without objection, the objection to his competency or credibility being then fully known. The defendant, by his conduct upon that occasion, waived the objection, and he cannot, in any subsequent stage of the cause, renew it.

But it is said, that, upon a rehearing, or an appeal from the decree at the Rolls to the Chancellor, new evidence is admissible to be read, which was not read at the original hearing. That may be true under particular circumstances, as where it is evidence originally in the cause, but not read; or where it is evidence newly discovered, since the hearing. On this subject, however, I do not dwell, because it was recently considered in this Court in a case, which underwent a good deal of consideration. I allude to the case of *Wood* v. *Mann* (ante p. 316). The case of *Needham* v. *Smith* (1 Vern. R. 463), has also been relied on to shew, that a confession of a witness, which has come to the knowledge of the other party since the hearing, and which goes to his competency or credibility, is admissible on an appeal from the Rolls. On that occasion it was also said, that if, after the hearing, a witness is convicted of perjury, the objection may be taken advantage of upon a rehearing. But, giving the fullest effect to this doctrine, it only applies to a case strictly of a rehearing (for an appeal from the Rolls is only a rehearing,[1] where the whole cause is opened anew; and where the evidence is already in the cause, or has been brought out since the former hearing. The present is not such a case.

It has been suggested by the counsel for the plaintiff, that, if a defendant cross examines a witness, knowing his interest, it is a waiver of the objection. The case of *The Corporation of Sutton Colfield* v. *Wilson* (1 Vern. R. 254) certainly supports this proposition. It has been thought to go farther, and to de-

[1] *East India Company* v. *Boddam*, 13 Ves. R. 421. *Buckmaster* v. *Harrop*, 13 Ves. R. 456.

cide that a mere cross examination upon the merits is a waiver of any objection to his competency. But this has, as a matter of general practice and doctrine, been overturned by the more recent decision in *Moorhouse* v. *De Passou* (19 Ves. R. 433, S. C. Cooper R. 300); in which it was held, that in equity the cross examination of a witness, in utter ignorance of his having given an answer to an interrogatory, showing that he has an interest in the cause, cannot amount to a waiver of the objection to his competency. In our practice, at least, where the objection is actually known, and may be taken at the time of the cross examination, it might deserve consideration, whether the case in Vernon ought not to be adhered to. But I do not, as it is unnecessary, give any opinion on this point.[1]

It is suggested, in the argument of the defendants' counsel, that James is to be examined anew before the Master, without any special order of the Court. If this is so, certainly it is an irregularity, and his examination upon a proper motion may be suppressed. The case of *Rowley* v. *Adams* (1 Mylne & Keen R. 543) is directly in point. But, if his former deposition, only is to be read in the hearing before the Master, that is all proper for the evidence already in the cause is for the consideration of the Master.

Upon the whole, my opinion, in every view of the matter, is, that the order ought to be superseded; and it is accordingly superseded.

FREDERICK SMITH v. DANIEL BURNHAM.

The confessions, conversations, and admissions of the defendant need not be expressly charged in a bill in equity, in order to entitle the plaintiff to use them in proof of facts charged, and in issue therein.

---

[1] But see on this point *Harrison* v. *Courtweld*, 1 Russ. & Mylne R. 428, and *Pigott* v. *Croxall*, ibid. 428, note.

The practice of the English Court of Chancery, and not that of the Court of Exchequer, forms the basis of the equity practice of the Courts of the United States.

Bill in Equity, wherein the plaintiff asserted an agreement between himself and the defendant to become copartners in the business of purchasing and selling lands and lumber in the State of Maine, and the purchase, by the said defendant, of lands and lumber, in pursuance of this agreement, for which he has never accounted to the plaintiff, and praying an account thereof, and a conveyance to the plaintiff of his share of the property, which remained unsold.

Admissions by the defendant of the asserted copartnership were alleged in the bill in the following terms: "During all the time aforesaid, as well as at divers other times, through all the negotiations aforesaid, as well as in many other negotiations in relation to the contract aforesaid, the said Daniel Burnham constantly spoke of the said interest in the said lands of the said Black, as belonging to the said copartnership, and spoke of, recognised, and treated your orator as having an equal and copartnership right therein." The particulars of the time, place, and circumstances of the admissions were stated in the bill. Among the interrogatories, filed by the plaintiff, for the examination of witnesses, were several which related to the alleged admissions of the copartnership by the defendant. On petition of the defendant, these were referred to a Master for impertinence, who, after looking into the interrogatories objected to, and the bill and answer, certified that the interrogatories were not impertinent or inadmissible. To this report of the Master, an exception was filed by the defendant, as follows: 'for that the said Master has certified, that the interrogatories referred to, are not impertinent or inadmissible, whereas he ought to have certified, that the same are impertinent and inadmissible.'"

The exception was now argued by *B. Rand* for the defendant, and by *B. R. Curtis* for the plaintiff.

Story J. The main question arising out of this exception is, whether, where a fact is charged, and put in issue in a bill, the examinations of witnesses to the confessions, conversations and admissions of the defendant, are admissible to prove the fact, unless such confessions, conversations, and admissions are expressly charged in the bill, as evidence of such fact. The argument for the defendant is, that they are not; for unless they are so charged, the defendant has no opportunity given to deny them by his answer, or to explain them; and thus is liable to be taken by surprise.

The case of *Hall* v. *Maltby* (6 Price R. 240, 258, 259), is relied on in support of the exception; and certainly, if the language of that decision is to be taken in its full latitude, it is directly in point. In that case there was a charge of a fraudulent withdrawal of tithable sheep from tithes; and Chief Baron *Richards*, at the hearing, rejected the evidence of conversations of the defendant, establishing the fact; because, though the fraudulent withdrawal was charged in the bill, the conversations were not. His language on this occasion was; "I, however, entirely lay out of this case all that the witness has sworn, as to the declaration of the defendant concerning the fraud, and his confessing, that it was his intention to defraud the tithe owner; and my reason is, because there is nothing of that kind stated in the bill; so that the defendant could have had no opportunity of answering or explaining it, and he could not, therefore, have been aware, that any such matter was intended to be proved; and, in cases of fraud, declarations of a fraudulent purpose are often the very gist of the case. He had no sort of intimation of it, so as to enable him to cross-examine the witness on that fact. I am the more anxious to state, that we are not now to be allowed to enter upon that part of the evidence in this case, there being no ground laid for it by the allegations in the bill; because I wish to have it make a due impression on those, who are in the habit of drawing pleadings in equity, in order that

they may take care, that that, which is the gist of the cause, should be stated on the record; for it is too much for a defendant to be overpowered by evidence, which he could have no idea, from any statement in the bill, would be brought forward at the hearing, when he might otherwise, perhaps, have been able, if he had been aware of it, to explain it to the satisfaction of the Court. This, however, I am aware is a delicate matter for the consideration of the pleader, as it is often dangerous to reveal the evidence intended to be used. But the bill and answer have very great effect on the decision of every cause; and although we would wish to avoid prolixity, and all unnecessary matter, generally speaking; yet it is indispensably necessary to state a defendant's declaration of fraud on the record, if it is intended to be used against him on the evidence at the hearing. In this case, that declaration, not being mentioned in the pleadings, cannot be suffered to be given in evidence in the cause; for if that acknowledgment were proved to be true, there would be no necessity for any further proof on the subject.

"In the present case, however, I think the evidence of fraud is abundantly strong, without reference to the evidence of the defendant's declaration, which is not warranted by the pleadings. I am of opinion, under the circumstances, which appear by clear legitimate evidence, the fraud is here sufficiently apparent; but I must repeat, that although, generally speaking, it may not be necessary to state on the record declarations by the defendant; yet in a case, charging fraud, where such declarations are often the gist of the cause, great injustice would be done to the party, if evidence were received of such declarations, where they are not charged in the bill.

"In the case of *Evans* and *Bicknell* (6 Ves. R. 183), the Lord Chancellor, very soon after he came to the Great Seal, so determined, on occasion of an attempt to introduce evidence of this kind, without previous intimation to the party, against whom it was to be used, by alleging it in the bill. He has held the same

opinion, I believe, ever since; and no man can differ from him in thinking, that such a thing cannot be done. For that reason, as I said before, I put this evidence entirely out of the question."

It is true, that in this case, there was a charge of fraud; and the Chief Baron seems to rely on that as important to his decision. And Lord Chancellor *Hart*, in *Mullonland* v. *Hendrick* (1 Molloy R. 359; S. C. Beatt. R. 277), in affirming the same doctrine, seems to have placed some reliance on the same fact, of its being a charge of fraud, considering fraud as an inference of law from facts, and not a mere fact. In other cases, however, he does not seem to rely on any such distinction. Indeed, it is very difficult to understand the ground of such a distinction. The facts to be established by such confessions, and conversations, and admissions, are not so much fraud in the abstract, as evidence conducing to establish it. If, upon a charge of fraud in a bill, stating that certain acts done were fraudulently done, evidence of confessions admitting the acts and the intent cannot be given in evidence, unless those confessions are also charged in the bill, as evidence of the fraud; it seems to me, that the principle of the rejection of the evidence must apply equally to all other cases of confessions to establish facts, which are to prove any other charge in a bill. Take the present case. The main object of the bill and of the interrogatories is, to establish a partnership in certain transactions between the plaintiff and defendant, out of which certain rights of the plaintiff have sprung, which he seeks to enforce by the bill. The confessions and admissions are not charged in the bill; but the partnership is. Now, partnership itself is not, in all cases, a mere matter of fact, but is often a compound of law and fact. And, I cannot see a single ground, upon which the evidence of confessions and admissions ought to be rejected in the case of a charge of fraud, which does not equally apply to the charge of partnership. In each case the evidence is, or may be, equally

a surprise upon the party; and in each of them he is equally prevented from giving, by his answer, such denials and explanations, as may materially affect the whole merits of the cause. It seems to me, then, that the doctrine, if it exists at all, must equally apply to all cases, where the fact charged, in respect to which the confessions, conversations, or admissions are offered, as proofs, constitutes the gist of the matter of the bill. And yet I do not understand, that such a doctrine, so universal, is any where established, unless it is so in Ireland by Lord Chancellor *Hart*, who has discussed the subject in a variety of cases, and seems to assert it in broad terms. He has expressly refused to apply it to cases, where written papers, letters, or documents, are relied on as proofs of general facts charged in the bill; although such papers, letters, and documents are not charged as proofs in the bill. (*Fitzgerald* v. *O'Flaherty* 1 Molloy R. 350); unless, indeed, those papers &c. are relied on as confessions of the party, which he treats as an exception to the general rule of evidence. "The general rule" (said he on one occasion) "is, that all evidence, intended to be relied on at the hearing, should be founded on some allegation, distinctly put on record, of fact, which it is calculated to support." "It is a very old principle, to be found very clearly stated in Vernon (*Whaley* v. *Norton* (1 Vern. R. 483); but I must be greatly misread, if the evidence, and not only the fact to be proved by the evidence, must be put in issue, to entitle the evidence to be read."[1] He repeated the same remark with the same exception in *Blacker* v. *Phepoe* (1 Molloy R. 357, 358).

The doctrine of Lord Chancellor *Hart*, to be deduced from all the cases decided by him, seems to be this;—that, wherever confessions, conversations, or admissions of the defendant, either oral or written, are relied on in proof of any facts charged in the

[1] *Fitzgerald* v. *O'Flaherty*, 1 Molloy R. 351, 352. See also *Houlditch* v. *Donegal*, 1 Molloy R. 363. *Farrell* v. ——, 1 Molloy R. 363.

bill, they are inadmissible, unless such confessions, conversations or admissions are charged in the bill; because they operate as a surprise upon the party, and he is deprived of any opportunity to deny or explain them in his answer. He admits the general rule to be the other way; and insists upon this as an exception to it.

The question, then, really is, whether the exception, either in its general form, as asserted by Lord Chancellor *Hart*, or in its qualified form, as asserted by Lord Chief Baron *Richards*, has a real foundation in Equity jurisprudence. Both of these learned judges rely on the case of *Evans* v. *Bicknell* (6 Ves. R. 174), in which they were counsel on opposite sides, to support their doctrine. Lord Chief Baron *Richards* says, that it was so decided in that case.[1] Lord Chancellor *Hart* does not agree to that; but admits, that he drew the bill in that case with a full knowledge of the exception.[2] It is very certain, that the point was not decided in the case of *Evans* v. *Bicknell*, if we are to trust to the printed report in 6 Ves. R. 174. And, upon the state of the pleadings, I do not see, how the point could have arisen. The bill, in that case, charged, that Bicknell "has admitted or declared, upon different occasions, and in the hearing of different persons, and that Stansell, at the time of the application, informed him, he wanted them (the deeds) for the purpose of obtaining credit; and he made such declaration or admission in the presence of the plaintiff, and Hawkins the solicitor, and the defendant Taylor." The answer alleged, that the defendant "never did admit or declare, in the presence of Hawkins, Taylor, or any other person, nor did Stansell, when he applied for the deeds, or at any time, inform him, that he wanted to obtain money by way of mortgage or otherwise; but he admitted, Stansell did inform him he wanted the use of the title deeds merely to show or convince some person or persons, with whom he was in the

[1] See 6 Price R. 260. [2] See 1 Molloy R. 360, 361.

habit of taking credit in the way of trade, that he and his wife were legally in possession of the rents and profits of the freehold and leasehold estates." The defendant, Taylor, was also examined as a witness, who stated, "that E. Evans and Hawkins (the attorney) came to him about the mortgage, and they and the deponent went to Bicknell, who strenuously denied, that he had delivered the deeds for the purpose of a mortgage; but at length, after much altercation and abusive language between him and Hawkins, informed them, that Stansell had desired him to lend him the title deeds, &c., to show to some person, who would credit him with goods in his trade to the amount of £40 or £50, upon seeing them; *and the person to lend the money was to receive two years' rents;* that he promised to return them in an hour, that he (Bicknell) had lent them; and had often sent, and could never get them; and he denied, that he knew of the mortgage." It is observable, that the testimony here stated, contains some particularities as to the confessions of Bicknell, not contained in his answer; which particularities were not charged in the bill, and, therefore, not met in the answer. And the question was, not whether the evidence on this account ought to be rejected; but whether the omission in the bill ought to prejudice the defence set up by the defendant in his answer. It was to this view, that Lord *Eldon* addressed himself in the passages cited at the bar, in support of the argument, that more credit ought to be given to the defendant's answer than to the assertion of one witness, Taylor. "The bill (said he) being amended, and this being a case, in which the Court ought to be particularly sure of the ground, on which it decides upon a fact, equivocal, or a declaration more or less according to the recollection of the precise terms by the witness, it is not unfair to observe, that probably before the amendment the plaintiff must have collected the account of it from Taylor; if he was the only person from whom she could have got the account; and the bill was then amended, in order to introduce the allegation as to Stan-

sell's representation to Bicknell. Taylor does not recollect half as much in his answer, as in his evidence; and that is a very material circumstance, when the defendant is to be charged upon this ground; that more credit is to be given to the defendant's denial than to the assertion of one witness. It ought to be with reasonable certainty put in issue by the allegations of the bill. Taylor's account is not necessarily inconsistent. I do not say it is necessarily consistent, with Bicknell's. But it must be necessarily inconsistent, and more credible than the denial by the answer, before the decree can be made. He says, the purpose, as represented by Bicknell, was to show the deeds to some person, who would let him have credit in the way of his trade; and in the same conversation they were to be brought back in an hour. That negatives the very idea, that the estate was to be pledged. That mode of representing the conversation, instead of opposing, confirms Bicknell's answer. Upon his answer, therefore, and Taylor's evidence, there is not that sort of contradiction, that entitles the plaintiff to a decree against Bicknell on the ground of fraud. The circumstance of Taylor's examination shows the danger; for Bicknell had no opportunity of answering the farther evidence of express charge. It is very extraordinary to say, this Court will not act upon the evidence of one witness contradicting the answer, and yet it will act upon that evidence, in order to charge the defendant in a circumstance, to which he has had no opportunity of stating himself. That therefore could only be a ground for inquiry." He afterwards added, "I hesitate also in giving Taylor credit for his evidence, carried in the depositions so much farther than the answer; and the bill containing no allegation to give Bicknell the benefit of his answer; with the conversation, that the money was to be repaid by two years' rents; and the circumstance, that in the security the rents are really devoted to the principal, as well as the interest." So that, it is apparent, that Lord *Eldon's* remarks were addressed to the comparative credi-

bility of the answer of the defendant, and the testimony of Taylor as to conversations and circumstances not alluded to in the bill; and not to the admissibility of the evidence itself.

The case of *Evans* v. *Bicknell* (6 Ves. R. 174, 189, 192), does not sustain the doctrine of Lord Chief Baron *Richards*, or of Lord Chancellor *Hart;* and I have not been able to find a single decision in the English Court of Chancery, which does sustain it. And yet, if the doctrine had been well established, it seems to me almost impossible that it should not be found clearly stated in the books, as it must be a case of so frequent recurrence in practice. On the contrary, it seems to me, that the case of *Earle* v. *Pickin* (1 Russ. & Mylne R. 547), shows, that no such rule is established in Chancery. There, the question in the cause turned upon the fact of notice of a settlement, which was charged in the bill. But the names of the witnesses, and the particular facts of notice, and the admissions and conversations with the defendant, which amounted to notice, were not stated in the bill, so that the defendant had no opportunity to meet the testimony. The counsel for the defendant objected to the admission of this testimony on this account, insisting, that the bill ought to have charged the particular facts of notice, and the conversations stated in the evidence, and the defendant might then have disproved them. As to the admissions of notice, they insisted, that the rule of pleading was, that a party could not rely on an admission made by his adversary, not appearing in the pleadings, unless it were put in issue, so that he, whom it sought to bind by it, might either disprove it, or explain it. For this defect, the counsel insisted, that an inquiry ought to be directed before the Master, so as to give the defendant an opportunity of meeting a case, which had been opened against him by surprise. The counsel for the plaintiff denied, that any such rules of pleading existed, as those, on which the argument for the defendant was founded; and resisted the inquiry. The Master of the Rolls directed the inquiry respecting

notice before the Master upon the ground, that neither the names of the witnesses, nor the particular facts of notice were stated in the bill. Upon appeal, the Lord Chancellor (Lord *Lyndhurst*) thought the direction of the Master of the Rolls at first right, and afterwards varied the order by directing an issue as to the supposed time of the conversations.

Now, upon this case it is material to remark, that, if there existed any such rule, as is supposed, the evidence of the admissions and conversations ought to have been rejected, and then there would have been an end of the cause; whereas the counsel, who raised the objection, only asked for a further inquiry before the Master. The counsel for the plaintiff utterly denied the existence of any such rule. And no authority on either side was quoted for the doctrine. If the Master of the Rolls, or the Lord Chancellor, had recognised the existence of such a rule, the order made by each of them would have been impertinent and incorrect. So that it seems to me very clear, that no such rule has been established in Chancery.

If then, in the absence of authority in favor of the rule, we look to principle, it seems to me impossible, that it can be supported. There is no pretence to say, that in general it is true, that, as to the facts to be put in issue, it is necessary, not only to charge these facts in the bill, but also to state in the bill the materials of proof and testimony, by means of which these facts are to be supported. Lord Chancellor *Hart* has admitted this in the fullest manner, saying; "The evidence of facts, whether documentary or not, need not be put in issue; evidence of confessions, whether documentary or not, must."[1] Why admissions or conversations, as materials of proof, should be exceptions from the general practice, I profess myself wholly unable to comprehend. Other papers and testimony may be quite as much matters of surprize, as documents or testimony, as conver-

[1] *Fitzgerald* v. *O'Flaherty*, 1 Molloy R. 352.

sations or admissions; and the circumstance, that conversations or admissions are more easily manufactured than other proofs, furnishes no ground against the competency of such evidence, but only against its cogency as satisfactory proof.

Two grounds are relied on to support the exception. The first is, that the defendant may not be taken by surprize, and, (as it has been said) admitted out of his estate; but may have an opportunity to cross-examine the witnesses. The second is, that the defendant may have an opportunity, in his answer, fully to deny, or to explain the supposed admissions or conversations. Now, the former ground is wholly inapplicable to our practice, where the interrogatories and cross interrogatories put to every witness are fully known to both parties; and, indeed, in the laxity of our practice, where the answers of the witness are usually as well known to both parties. So that there is no general ground for imputing surprise. Indeed, in this very case, it is admitted by the learned counsel for the defendant, that there has not been any surprise. The second ground is applicable here. But, then, proofs, documentary or otherwise, may be offered as evidence of facts charged in the bill, as well as admissions and conversations, which it might be equally important for the defendant to have an opportunity to deny or to explain, in order to support his defence. Yet the evidence of such facts is not, therefore, inadmissible. So that the exception is not coextensive with the supposed mischief.

But it seems to me, that the exception would itself be introductive of much of the mischief, against which the practice of the English Court of Chancery is designed to guard suitors. In general, the testimony to be given by witnesses in a cause at issue in Chancery, is studiously concealed until after publication is formally authorized by the Court. The witnesses are examined in secret upon interrogatories not previously made known to the other party. The object of this course is to prevent the fabrication of new evidence to meet the exigencies of

the cause, and to take away the temptations to tamper with the witnesses. Now, if the exception be well founded, it will (as has been strongly pressed by counsel) afford great opportunities and great temptations to tamper with witnesses, who are known to be called to testify to particular admissions and conversations. So that it may well be doubted, whether, consistently with the avowed objects of the English doctrines on this subject, such an exception could be safely introduced into the English Chancery. There is another difficulty in admitting the exception; and that is, that there is no reciprocity in it; for while the defendant in a suit would have the full benefit of it, the plaintiff would have none, since his own admissions and conversations might be used, as rebutting evidence, against his claims asserted in the bill, although they were not specifically referred to in the answer.

Several cases have been referred to, both in the English and the American Reports, in which the case has been mainly decided upon the admissions or conversations of the parties, which were not specifically stated in the bill, or other pleadings. I have examined those cases; and although it is not positively certain, that there were not, in any instance, any such admissions or conversations charged in the bill; yet there is the strongest reason to believe, that such was the fact; and no comment of the counsel or of the Court would lead us to the supposition, that there was imagined to be any irregularity in the evidence. I allude to the cases of *Lench* v. *Lench* (10 Ves. R. 511), *Besant* v. *Richards* (1 Tamlyn R. 509), *Neathway* v. *Ham* (1 Tamlyn R. 316), *Necot* v. *Barnard* (4 Russ. R. 247), *Parle* v. *Peele*, (1 Paige R. 477), *Marks* v. *Pell* (1 John. Ch. R. 594), and *Harding* v. *Wheaton* (11 Wheat. R. 103; S. C. 2 Mason R. 375). So far as my own recollection of the practice in the Courts of the United States has gone, I can say, that I have not the slightest knowledge, that any such exception has ever been urged in the Circuit Courts, or in the Supreme Court, although

numerous occasions have existed, in which, if it was a valid objection, it must have been highly important, if not absolutely decisive. Until a comparatively recent period, I was not aware, that any such rule was insisted on in England or America, notwithstanding the case of *Hall* v. *Maltby* (6 Price R. 250, 252, 258). Indeed, Mr. Gresley, in his late Treatise on Evidence, has not recognised any such rule, although in one passage the subject was directly under his consideration, and he relied for a more general purpose on that very case.[1] If it had been clearly settled in England, it would scarcely have escaped the attention of any elementary writer, professedly discussing the general doctrines of evidence in Courts of Equity.

My opinion is, that the principle to be deduced from the case in 6 Price R. 250, before Lord Chief Baron *Richards*, supported, as it is, by the other cases already cited before Lord Chancellor *Hart*, is not of sufficient authority to establish the exception contended for, as an exception known and acted upon in the Court of Chancery in England, whose practice, and not that of the Court of Exchequer, furnishes the basis of the equity practice of the Courts of the United States. I have a very strong impression, that in America the generally received, if not the universal, practice, is against the validity of the exception. If the authorities were clear the other way, I should follow them. But if I am to decide the point upon general principles, independent of authority, I must say, that I cannot persuade myself, that the exception is well founded in the doctrines of equity jurisprudence, as to pleadings or evidence.

The exception, therefore, to the Master's report must be overruled. It would be a very different question, if the bill should contain no charges, as to admissions or conversations of the defendant, and the defendant should be surprised at the hearing by evidence of such admissions and conversations in

[1] See Gresley on Evidence, 161.

support of the facts put in issue, whether the Court would not, for the purposes of justice, enable the defendant to countervail such evidence, by giving him leave to offer other evidence, explanatory or in denial of it, upon reference to the Master, or by an issue, as was done in the case of *Earle* v. *Picken* (1 Russ. & Mylne R. 547.) I imagine, that one reason, why, when evidence of admissions or conversations of the defendant is intended to be introduced, in support of facts charged in the bill, and put in issue, such admissions and conversations are so often charged in the bill, is to avoid the very difficulties, in which the omission must leave the cause; viz. the little confidence, which the Court would give to it, as a species of evidence easily fabricated, and the inclination of the Court to endeavor, by a reference or an issue, to overcome its force.

I have not thought it necessary, in the view, which has been taken of the exception to the Report of the Master, to consider with much care the other objection made to the exception; to wit, that the admissions and conversations are sufficiently charged in the bill to let in the evidence, even if the rule were, as the plaintiff's counsel has contended it to be. The only charge bearing on this matter is, that "at all the times aforesaid, as well as at divers other times, through all the negotiations aforesaid, as well as in many other negotiations in relation to the contract aforesaid, the said Daniel Burnham (the defendant) constantly spoke of the said interest in the said lands of the said Black, as belonging to the said copartnership, and spoke of, recognised, and treated your orator as having an equal and copartnership right therein." This language is somewhat indeterminate; for it is not charged, whether the defendant spoke to the plaintiff, or to third persons; and no persons in particular are named, with whom he held any conversations on the subject. If the rule contended for existed, I should greatly doubt, whether such an allegation, in such loose and uncertain terms, was a sufficient compliance with it; for it

would lie open to all the objections, against which the rule is supposed to be aimed. The defendant, to so general a charge, could do no more than make a very general answer. So, that he would be deprived of all the benefit of all explanations and denials of particular conversations. But it is unnecessary to dwell on this point, as the other is decisive.

The exception was overruled.

CIRCUIT COURT OF THE UNITED STATES.

Fall Circuit.

MAINE, OCTOBER TERM, 1837, AT WISCASSETT.

BEFORE { Hon. JOSEPH STORY, Associate Justice of the Supreme Court.
Hon. ASHUR WARE, District Judge.

JESSE GORDON *v.* ARCHELAUS LEWIS AND OTHERS.

An interlocutory decree was made in Equity, by which the executors of A. Lewis, were chargeable with the sum of $1891,05 on account of rents and profits due to the plaintiff, Jesse Gordon. A petition was now filed, praying that a certain sum, amounting to $1071,25, due from John Gordon, to the executors, might be set-off against the foregoing sum; it being alleged that Jesse Gordon, the plaintiff, was a mere nominal party, and that John Gordon was the real party in interest, and was insolvent. It did not appear, that there was any mutual credit between A. Lewis and John Gordon, or any express or implied agreement of set-off. *Held*, that the proceedings had passed that stage, when the claim of set-off could be entertained; that the question, whether Jesse Gordon was a nominal party or not, cannot be investigated in a collateral proceeding, like the present; that the proper course would have been to file a cross bill at an earlier stage, or now to institute an original bill, in some competent Court; and that the insolvency of John Gordon does not *per se* constitute a sufficient equity to induce a Court of Equity to sustain the set-off.

In matters of set-off, Equity follows the law; and the fact of the existence of mutual demands, without some intervening equity between the parties,

would not justify a Court of Equity in allowing a set-off. *Semble*, that the mere insolvency of one of the parties, does not constitute such an equity.

THIS case was formerly before the Court, upon exceptions to the Master's report; and the decision thereon, is reported in 2 Sumner R. 143, (S. C. 1 Sumner R. 524). The decree thereupon entered at May term, 1835, was as follows.

It is ordered, adjudged and decreed by the Court, that the report of the Master be, and do hereby stand confirmed, in all respects, in which it is not altered or varied by this present decree.

And it is further ordered, adjudged and decreed, inasmuch as it appears in and by the report aforesaid, that the original mortgage to Mark Haskell in the proceedings mentioned, under which the defendants claim title by assignment thereof, has been long since satisfied and extinguished, that the said Portland Manufacturing Company, do forthwith and immediately, surrender and deliver up to the plaintiff, the possession of the premises: and, that unless the same be done, on or before the eighth day of September next, that a writ of possession, in the nature of a writ of *Habere facias possessionem*, do issue from the Clerk's office in due form of law, for the possession of the same premises; and, that the plaintiff also do have execution against the defendants, for his costs in the premises up to the present time.

And it is further ordered, adjudged and decreed, that the said Daniel Fox and Josiah Pierce, as executors of the said Archelaus Lewis, do from the assets of the said Lewis in their hands, if any such there be, pay into court the sum of eighteen hundred and ninety-one dollars and five cents, being the amount of the surplus rents and profits received by the said Lewis, from and after the satisfaction and extinguishment of the said Haskell mortgage, viz. from and after the twenty-third day of April, A. D. one thousand eight hundred and eighteen, to the time of the sale of the said mortgaged premises to the said Portland

Manufacturing Company, viz. to the third day of August, A. D. one thousand eight hundred and thirty-one. And that the said Portland Manufacturing Company do pay into Court the sum of eighty-six dollars and ninety cents, being the amount of interest allowed by the Master, as and for an occupation rent, or what might have been received by them, as rents and profits of the said mortgaged premises, since their purchase thereof as aforesaid.

And it is further ordered, adjudged and decreed, that the charge of interest upon such surplus rents and profits received by the said Lewis according to the annual rests made by the Master and contained in his report, be, and hereby is, under all the circumstances of the present case, disallowed.

And it is further ordered, adjudged and decreed, that the said several sums of money so ordered to be paid into Court, be so paid into Court on or before the first day of October next, by the parties respectively; otherwise, process in the nature of an execution as for a specific performance, is to issue against the parties respectively for the same. But the said Fox and Pierce, executors as aforesaid, are to be at liberty at the Term of this Court, to be held on the first day of October next at Wiscasset, within and for this District of Maine; to show what assets they have in their hands, or whether they have any assets in their hands of the said Lewis to pay the said sum; and if they shall not appear at the said time and place, or shall not render a due account of the assets of said Lewis in their hands, as they shall be ordered and required by the Court, then they shall be taken to have confessed that the assets in their hands, are sufficient to pay the sum aforesaid, and be held chargeable therewith accordingly.

And all parties interested, or claiming an interest in the sums so to be paid into court, shall, when the same shall be so paid into court, be at liberty to apply by supplementary proceedings,

to have their respective rights thereto ascertained and established.

And all further orders and decrees, are reserved for the consideration of the Court.

At May Term, 1836, the executors of Archelaus Lewis, filed a petition to the Court, in substance as follows.

Josiah Pierce, of Gorham, in said district, and Daniel Fox, of said Portland, executors of the last will and testament of Archelaus Lewis, late of Westbrook, in said district, respectfully represent, that at May term of this honorable Court, A. D. 1835, in the suit in Equity, in which Jesse Gordon was plaintiff against them and the Portland Manufacturing Company, they were ordered by the decree of said Court, to pay into court $1,891 05, from the assets of said Lewis in their hands, if any such there be; with liberty for them to show to the Court what assets they have in their hands, which they did at the last term of the Court.

That said sum of $1,896 05 was for rents, which accrued long before the conveyance was made by John Gordon to Jesse Gordon, as hereafter stated, and did not pass to said Jesse by said conveyance, but belonged to said John, and still belong to him, subject to the equitable claim, which they the said Pierce and Fox have against the same as executors of said Archelaus Lewis, as hereafter stated.

And it was further ordered and decreed, that all parties interested, or claiming an interest, in the sum so to be paid into court shall, when the same is paid into court, be at liberty to apply by supplemental proceedings to have their respective rights thereto ascertained and established.

And the said Pierce and Fox further represent, that although a deed was produced from John Gordon to said Jesse Gordon, under which said Jesse and his representatives pretend to claim said sum of $1,891 05, your petitioners have reason to believe, and do in fact believe, that said deed was given without

consideration, and for the purpose of covering said property in the hands of said Jesse for the benefit of said John, he being in debt and insolvent.

And, that whatever is paid under said decree, or the greater part of it, will go to the use and benefit of said John Gordon. That said John is largely indebted to them, the said Pierce and Fox, in their said capacity of executors of said Lewis, to wit, in the sum of $1,071 25, and was so indebted at and before the time he made said deed to said Jesse Gordon, and at the time the rents accrued, which they are required to pay into court as aforesaid. That there is no mode in which they can obtain payment of the debt so due from said John Gordon to said Lewis's estate, unless they can be permitted to deduct the same from the sum, which they are ordered to pay into court, or to receive the same out of said sum, by order and decree of this honorable Court.

The case was argued on this petition by *C. S. Daveis*, for the plaintiff, and by *S. Longfellow*, for the defendants.

Story J. The object of the present petition is to have the benefit of a set-off of $1071 25, which it is now admitted is due and owing to the executors from John Gordon, to be allowed and deducted from the sum of $1891 05, the rents and profits, for which the executors are chargeable under the decree of the Court already rendered. The ground, upon which this claim is asserted, is, that John Gordon is the real party in interest in the present case and is insolvent, and that Jesse Gordon is a mere nominal party.

This very question came under the consideration of the Court at the former hearing upon the Master's report and an exception taken thereto, which presented it. The exception was then overruled upon the ground, that there were no facts establishing the claim. That ground is now removed; and it is admitted, that there is the sum of $1071 25 due from John Gordon to the executors. But on that occasion the Court enter-

tained great doubts, whether the claim could be sustained as a set-off in any form.

It is very clear, that the claim cannot be asserted in the present suit; and if it could have been at any stage of the suit asserted (which is denied), the proceedings have passed that stage. The reservation in the decretal order, allowing all persons interested in the sums paid into court to come in and prosecute their claims thereto, is wholly inapplicable to the executors, who have no interest whatsoever in those sums. It applied solely to those persons, who were entitled to Joshua Webb's equity of redemption. Indeed, the present petition asserts no right to any part of those sums; but only a right of set-off against them, to be recouped from the amount, as an adverse claim.

Upon this petition it is impossible for the Court in this suit, to go into any proofs of the material facts asserted in it, and which are vital to the relief sought. The question, whether Jesse Gordon is a nominal party, or not, cannot be investigated in such a collateral proceeding. The proper course would have been to have filed a cross bill at an earlier stage of the proceedings, or now to institute an original bill in some court competent to maintain it.

But if a cross bill had been duly filed, or an original bill were now before this Court, asserting the same facts, and they were all proved, my judgment is, that it is not a case, in which a Court of Equity could grant the relief. The jurisdiction of Courts of Equity in matters of set-off is very narrow, and closely follows that of the law. The mere fact of the existence of mutual demands constitutes no ground in equity for a set-off, however reasonable it might have been to have allowed it upon principles of natural justice. The authorities are the other way. I have had occasion to consider this doctrine in various cases, and need do no more than refer to the cases of *Jackson* v. *Robinson* (3 Mason R. 138), *Green* v. *Darling* (5 Mason R. 201),

Gordon v. *Lewis* (2 Sumner R. 151), and *Howe* v. *Sheppard* (2 Sumner R. 412). To justify a Court of Equity in allowing a set-off there must be some original or intervening equity between the parties beyond the mere fact of mutual debts. There must be a mutual credit, founded on a subsisting debt on the other side, or an express or implied agreement for a set-off of mutual debts. There is no pretence of any such mutual credit, or any such express or implied agreement of set-off in the present case. The petition asserts none. The whole facts of the present suit repudiate it. The sole equity now set up is the insolvency of John Gordon. But I am not satisfied, that mere insolvency alone constitutes a ground for the interference of the Court. On the contrary it appeared to me in the case of *Howe* v. *Sheppard* (2 Sumner R. 415, 416), that there was no sufficient authority to establish that doctrine. I am aware of the bearing of the case of *Simson* v. *Hart* (14 John. R. 63), which, upon its own circumstances, may have been very properly decided. But if it meant to assert, as a general doctrine, that mere insolvency of one of the parties gives a right in equity to set off mutual unconnected debts, I am not prepared to say, that it can be sustained as a sufficient authority to bind this Court to that extent, whatever may be my respect for the learned Judges, who decided it.

It has been suggested, that the case might be treated as one within the equity of the statutes of set-off of Maine (stat. of 1820, ch. 59, § 19, and of 1823, ch. 228). But it appears to me, that neither in their words, nor in their intent, can they be applied to cases like the present. The cases relied upon in the argument from the Massachusetts and Maine Reports were founded upon the laws of those States, applicable to the insolvent estates of deceased persons; and of course they turn upon very different considerations.[1]

[1] See *McDonald* v. *Webster*, 2 Mass. R. 498. *Sewall* v. *Sparrow*, 16 Mass. R. 24, and *Lyman* v. *Estes*, 1 Greenl. R. 182.

There is another ingredient in this case, suggested in the plaintiff's argument, which, if well founded, as matter of fact (as it seems to be), would dispose of the question upon stronger grounds. It is, that the mortgage was actually assigned by John Gordon to Leal & Porterfield, under whom the plaintiff asserts title, before the debt now insisted on as a set-off became due, or even existed. But I do not dwell on this fact, because it is not presented in such a direct form in the present aspect of this cause as to be deemed strictly in judgment.

Upon the whole my opinion is, that the prayer of the petition must be rejected; and the petition itself be dismissed. The District Judge concurs in this opinion, and, therefore, let the petition be dismissed.

INDEX.

ABANDONMENT.
See ADMIRALTY, 13.
INSURANCE, 8, 9.

ACCOUNT.
See MASTER IN CHANCERY, 4.

ACKNOWLEDGMENT OF DEEDS.
See CONVEYANCE, 7, 8.

ACTION ON THE CASE.
See CONSPIRACY.

ACTIONS, LIMITATIONS OF.
See ADMIRALTY, 12, 13.

ADMINISTRATORS.
See JUDGMENT.

ADMIRALTY.
1. In a libel for a maritime trespass, assault and battery, against two respondents, if there is joint decree for damages, either of the respondents may appeal without joining the other, where the respondents have severed in their pleadings or answers, or jointly pleaded a negative plea in the nature of the general issue. But it seems otherwise, if they had pleaded a joint justification.
Thomas v. *Lane.* 1

2. The Admiralty jurisdiction as to torts depends upon locality, and is limited to torts committed on the high seas, or at farthest to torts committed on waters within the ebb and flow of the tide. *Ibid.*

3. It seems that torts committed on tide waters within foreign ports are within the Admiralty jurisdiction. *Ibid.*

4. The statutes of 13th and 15th Richard II., respecting the Admiralty, do not affect its jurisdiction in foreign ports. *Ibid.*

5. Every libel for a tort must contain on its face sufficient averments as to place, to show that it is within the Admiralty jurisdiction, otherwise it must be dismissed. *Ibid.*

6. A receipt by a seaman on receiving the sum due to him for wages, stating that it is in full for all services and demands for assault, battery, and imprisonment, &c. against the owner, and officers, is no bar to a suit for an assault, battery, and imprisonment. And if it were, it could not avail the party, unless specially relied on in the answer as matter of defence. *Ibid.*

7. Separate and distinct trespasses cannot be joined in the same libel against defendants who are not jointly liable. *Ibid.*

8. In Admiralty pleadings, the better practice is to present new facts, when necessary, by an amendment to the libel and answer, as in Chancery, and not by way of replication and rejoinder.
The Brig Sarah Ann. 206

9. The proofs and allegations must coincide. Proofs to facts not put in contestation by the pleadings, and allegations of facts not established by proofs, will both be rejected. *Ibid.*

10. Appellate Courts in Admiralty allow parties, under certain circumstances, *non allegata allegare, et non probata probare.* *Ibid.*

11. Courts of Admiralty, so far

as their jurisdiction extends, administer it upon the principles of a Court of Equity, and not upon those of strict law. *Ibid.*

and Brown v. *Lull.* 443

12. Courts of Admiralty, like Courts of Equity, govern themselves by the analogies of the common law limitations of actions, and, only under very strong circumstances, depart from them. Independently of any limitations, they will not entertain suits for stale demands.

The Brig Sarah Ann. 206

13. Where the acceptance of an abandonment occurred in October, 1828 (which related back to the loss in the preceding March), and the libel was brought in September, 1834: *Held*, that, if the vessel had been within the reach of the process of this Court for a reasonable time, to the knowledge of the libellants, after such a lapse of time, the libel ought not to be maintained. *Ibid.*

14. The Admiralty has jurisdiction over charter-parties for foreign voyages, and will enforce the lien thereof.

Certain Logs of Mahogany. 589

15. An objection, grounded on the pendency of another suit, for the same cause of action, is preliminary in its character, and should be taken in Admiralty by a special plea, in the nature of a plea in abatement, known, in the practice of the Admiralty, as a dilatory or declinatory exception. *Ibid.*

16. The objection of *lis pendens* can be sustained only, where the two suits are of the same character, and where the *plaintiff* in both suits is the same. *Ibid.*

17. A suit in a State Court by replevin, or by an attachment of the property in question, cannot supersede the right of a Court of Admiralty to proceed by a suit *in rem*, to enforce a right or lien against that property. *Ibid.*

See BOTTOMRY BOND, 2.
SHIPPING, 15.

ADMISSIONS.
See EQUITY.

ADVERSE POSSESSION.
See MORTGAGE, 24.

AGENT.
See INSURANCE, 18.

ALDERMAN.
See CONVEYANCE, 7.

AMENDMENTS.
See ADMIRALTY, 8.

APPEAL.
See ADMIRALTY, 1, 10.

ARDENT SPIRITS.
See NEW TRIAL, 10.

ARMY OF THE UNITED STATES.
See BREVET COMMISSION, 1, 2.

ARRAIGNMENT.
See TRIAL, 5.

ARREST OF JUDGMENT.
See BILL OF EXCEPTIONS, 4.

ARRIVAL.
See CONSUL, 8.

ASSAULT AND BATTERY.
See ADMIRALTY, 1, 6.

ATTACHMENT.
See CONVEYANCE, 1, 4, 5, 6.

ATTORNEY, POWER OF.

Semble, that a power of attorney, authorizing the defendant to receive certain moneys, and which was intended to be a security, in the nature of a lien, to the defendant, for his commissions, would be a power coupled with an interest, though not in the ordinary sense of those terms.

Hammond v. *Allen.* 386

AUDITOR.
See MASTER IN CHANCERY, 8.
VERDICT.

BETTERMENTS.
See MORTGAGE, 2, 10.

BILL OF EXCEPTIONS.
1. No Bill of Exceptions lies in any capital case, in the Courts of the United States.
United States v. *Gibert*. 19
2. The only mode contemplated by the laws of the United States to revise the opinions of the judges of the Circuit Court in criminal cases is, when the judges are divided in opinion at the trial, and then the point of division may be certified to the Supreme Court for a final decision under the Judiciary Act of 1802, ch. 31, § 6. *Ibid.*
3. No Bill of Exceptions lies at common law in cases of treason and felony. *Quære*, if one lies in cases of misdemeanors. *Ibid.*
4. If the Court has the power in a capital case to allow a Bill of Exceptions, it is too late to present it, when no tender has been made at the time, and after the motions for a new trial and in arrest of judgment have been argued and overruled. *Ibid.*

BONA FIDE PURCHASER.
See PURCHASER *bonâ fide*.

BOND.
See JUDGMENT.

BOTTOMRY BOND.
1. A valid Bottomry Bond may be made by the owners of a vessel, in a foreign or a home port.
The Brig Draco. 157
2. The Admiralty has jurisdiction over all maritime contracts *in personam*, and also *in rem*, where there is a maritime lien or express pledge, as security; and this embraces, of course, a Bottomry Bond, given by the owner in the home port, where there is an express pledge, as security. *Ibid.*
3. It is not necessary to the validity of a Bottomry Bond, made by the owner of a vessel, that the money borrowed should be advanced for the necessities of the ship, or cargo, or voyage; though it would be otherwise, where the money was borrowed by the master, *virtute officii*. *Ibid.*
4. A Bottomry Bond is a contract for a loan of money on the bottom of the ship, at an extraordinary interest, upon maritime risks, to be borne by the lender, for a voyage or a definite period. *Ibid.*
5. An hypothecation of a vessel, on maritime risks, draws after it a maritime lien. *Ibid.*
6. A Bottomry Bond need not be recorded under the Statute of Massachusetts (1832, ch. 57), which provides for the registration of mortgages of personal property. *Ibid.*
7. A valid Bottomry Bond will be upheld, where there are no laches on the part of the lender, even against a *bonâ fide* purchaser, without notice. *Ibid.*
8. A Bottomry Bond may be upon time, as well as upon a specific voyage. *Ibid.*
9. If, after the risk on a Bottomry Bond has commenced, a sale or transfer of the vessel takes place, or the voyage is in any manner broken up by the borrower, the maritime risk terminates, as in the case of a policy of insurance, and the bond becomes presently payable. *Ibid.*
10. Where it was expressly stipulated in a Bottomry Bond—"that the said brig, shall be delivered to no other use or purpose whatsoever, until payment of this bond is first made;" *held*, *à fortiori*, that a sale of the brig, after the commencement of the maritime risk, terminated the risks under the bond, and entitled the lender to an immediate right of action. *Ibid.*
11. Trover would lie at common law, in favor of the lender on bottomry, against the vendee of the vessel, who, after the commence-

ment of the maritime risk, and before the satisfaction of the bond, had taken possession of the vessel. *Ibid.*

BREVET COMMISSION.

1. The defendant, being a lieutenant in the army of the United States, was commissioned June 30th, 1834, as a captain by brevet, to take rank from September 30th, 1829. *Held*, that the commission took effect retroactively, and that the defendant was entitled to receive the pay of a captain by brevet, for services rendered as captain, after the date last above-mentioned.

United States v. *Vinton.* 299

2. Where a brevet commission in the army of the United States is conferred upon a party, to take rank from a prior date, the pay and emoluments of the rank conferred follow as an incident from this date, whenever the party has rendered services according to that rank. *Ibid.*

BROKER.

See INSURANCE, 21.

CAPITAL CASES.

See BILL OF EXCEPTIONS, 1, 4.
NEW TRIAL, 1, 2, 6, 8.

CAPTURE OF NEUTRAL SHIP.

See SHIPPING, 9, 14.

CARGO.

See CHARTER-PARTY, 2, 3, 4, 5.

CASE, ACTION ON.

See CONSPIRACY.

CERTIFICATE.

See CONSUL, 1, 2, 3.
EVIDENCE, 10.

CHANCERY.

See EQUITY.

CHANCERY, MASTER IN,

See MASTER IN CHANCERY.

CHARTER-PARTY.

1. The general owner of a ship will be deemed owner for the voyage, notwithstanding a charter-party, if he retains the possession and control of the navigation of the ship during the voyage, and if the master is his agent, acting under his instructions. So also, if the intention of the parties, with regard to this point, seems doubtful on the face of the charter-party.

Certain Logs of Mahogany. 589

2. The lien on the cargo for freight is recognised by the common law and maritime law; but it may be displaced by particular circumstances, which denote a clear and determinate abandonment. *Ibid.*

3. A clause in a charter-party, providing, that the freight shall be paid "in five days after [the brig's] return to and *discharge* in Boston," is not a waiver or displacement of the lien for freight; the word "*discharge*" merely referring to the unlading, and not to the delivery of the cargo. *Ibid.*

4. *Semble.* A shipper has a right, by the maritime law, to examine the goods after they are unlivered, in order to ascertain, whether they are damaged or not, before he makes himself liable at all events for the freight. *Ibid.*

5. Where by the charter-party the freight was a gross sum payable on the successful close of the whole voyage, and the bill of lading declared, that the return cargo should be delivered to the shipper or his assigns, they paying freight, as per charter-party; *Held*, that a lien attached to the homeward cargo for the freight due from the whole voyage; also, that the consignee by his receipt of the goods, became personally liable, upon his implied assumpsit, for the whole freight.

See ADMIRALTY, 14.

CHOSE IN ACTION.

See MORTGAGE, 11.

CHOSE IN ACTION.
See SALE, 1.
UNITED STATES, PRIORITY OF.

COLLECTORS.
The Act of Congress of 1822, ch. 107, provides, that whenever the emoluments of certain collectors of the customs "shall exceed $3,000 in any one year, &c., *the excess* shall in every such case be paid into the treasury of the United States. The defendant was collector of the port of Gloucester, and was removed from office July 29th, 1829. From January 1st of the same year to the day of his removal, he had received, for salary, fees, and commissions $3,457 83; the excess of this over $3,000, after deducting certain legal expenses, he paid to the treasury of the United States. *Held*, that all the fees and commissions received by the collector are to be deemed to be received for his own use, until they exceed the maximum amount of $3,000; that the defendant was, therefore, absolutely entitled, in his own right, to the fees and emoluments of office, not exceeding $3,000, received during the seven months preceding his removal, although he did not continue in office a whole year from January 1st; and that the year of his successor in office commenced on the day of his appointment, and ended with the same day in the succeeding year.
United States v. *Pearce*. 575

COMBINATION.
See SHIPPING, 3, 25.

COMMISSION BY BREVET.
See BREVET COMMISSION.

COMMON CARRIERS.
1. The proprietors of the steamboats between Providence and New York are common-carriers, and, as such, bound to receive all persons on board, to whose character and conduct there is no reasonable objection, if they have suitable accommodations.
Jencks v. *Coleman*. 221
2. They may rightfully exclude all persons of bad character or habits—all whose objects are in any way to interfere with their interests, or to disturb their line of patronage, and all who refuse to obey the reasonable regulations, which are made for the government of the steamboat; and they may rightfully inquire into the habits or motives of passengers who offer themselves. *Ibid.*
3. The plaintiff was the known agent of the *Tremont* line of stage-coaches; the proprietors of the steamboat Benjamin Franklin, had, as he well knew, entered into a contract with the *Citizens'* Stage Coach Company, to carry passengers between Boston and Providence, in connexion with, and to meet the steamboats. The plaintiff had been in the habit of coming on board the steamboat, at Providence and Newport, for the purpose of soliciting passengers for the Tremont line: *Held*, if the jury should be of opinion, that the above contract was reasonable and *bonâ fide*, and not entered into for the purpose of an oppressive monopoly, and that the exclusion of the plaintiff was a reasonable regulation, in order to carry this contract into effect, that the proprietors of the steamboat would be justified in refusing to take the plaintiff on board.
Ibid.

CONDITION PRECEDENT.
See SURETY, 4.

CONDITIONAL PURCHASE.
See SALE, 2.
SURETY, 3.

CONFESSIONS.
See EQUITY, 33.
EVIDENCE, 4, 5.

CONSPIRACY.

Semble. An action on the case, in the nature of an action for a conspiracy, may be maintained, as in the case of a common tort against all, or any one, or more of the tort-feasors.

Smith v. *Rines.* 339

See SHIPPING, 3, 25.

CONSTITUTION OF THE U. STATES.

See NEW TRIAL, 1, 3, 6, 8.

CONSTRUCTION.

An assignment conveyed to the plaintiff "all the goods, wares, merchandises, and *personal property of every kind*, belonging to the late firm," &c. *Held*, that the words "personal property of every kind," in the foregoing connexion, signify visible, tangible property, *ejusdem generis*, as goods, &c. and that an interest under a contract would not pass thereby.

Kendall v. *Almy.* 278

See COURTS OF U. STATES, 1.
EQUITY, 26.
INSURANCE, 12, 19.

CONSTRUCTIVE NOTICE.

See NOTICE, 2, 3.

CONSUL.

1. A consul's certificate of any fact is not evidence between third persons, unless expressly or impliedly made so by statute.

Levy v. *Burley.* 355.

2. *Quære*, if a consul's certificate is evidence, that a ship's register was deposited with him, agreeably to the Act of Congress of 1803, ch. 62, § 2. *Ibid.*

3. An information was brought in the name of the consul of the United States, for the Island of St. Thomas, suing for the benefit of the United States, against the defendant, to recover a penalty for not depositing with the consul the ship's register on her arrival at the port of St. Thomas, agreeably to the Act of Congress of 1803, ch. 62, § 2. *Held*, that the certificate of the consul was not admissible evidence, to prove the arrival or departure of the vessel. *Ibid.*

4. *Quære*, if a consul, who sues for a penalty, in his own name and person, but for the benefit of the United States, is liable for costs. *Ibid.*

5. *Quære*, if an *information* is the proper proceeding in the present case, where the suit is not brought in the name of the government. *Ibid.*

6. Under the Consular Act of 1803, ch. 62, § 4, the penalty of $500 for not depositing the ship's register with the consul, on arrival in a foreign port, must be sued for within two years, the limitation prescribed by the Act of 1790, ch. 36, § 31, it not being a revenue law within the meaning of the Act of 1804, ch. 40, § 3.

Parsons v. *Hunter.* 419

7. *Semble*, that an information does not lie for such penalty; but an action of debt, in the name of the consul is the proper remedy. *Ibid.*

8. *Semble*, that any voluntary arrival in a foreign port, in the course of the voyage, although for advices only, and not the port of final destination, is within the purview of the Act. *Ibid.*

CONTRACT.

See COMMON CARRIERS, 3.
CONSTRUCTION.
CUSTOMS, 2.
LIBEL.
MISTAKE, 1, 2, 3.
SALE.

CONVENTION WITH THE KING OF THE TWO SICILIES.

See SHIPPING, 20.

CONVEYANCE.

1. A conveyance had been made of certain lands, on the 7th of May, 1829. Before it could be properly recorded, the defendant attached

these lands, to secure a note signed by the grantors, on the 8th of May, 1829, the day following the execution of the conveyance, and payable in thirty days, but which was ante-dated, as of the 3d April preceding, being the time when the goods, which formed the consideration of it, had been sold on a credit of six months. *Held*, that the ante-dating the note, and creating a present debt, on which the attachment of the lands was made, was a fraud upon the grantees, and did not disturb their rights under the conveyance, whatever might be the validity of the proceeding, as between the parties.

Briggs v. *French*.

2. A conveyance, which purports to be *bonâ fide*, and for a valuable consideration, will be taken to be so, until the contrary is shown. *Ibid.*

3. A conveyance made by a citizen of one State, to a citizen of another State, for the purpose of enabling the latter, to maintain a suit on it, in a Court of the United States, vests a legal title as between the parties; and a stranger, not claiming under either of the parties, has no right to inquire into the motive of the conveyance. *Quære*, if the grantee would hold his title subject to the equities it had in the hands of the grantor. *Ibid.*

4. *Quære*, if an attachment by a creditor will overreach the title of a prior grantee from the debtor, unless he has been guilty of laches, in recording his deed? If he records it within a reasonable time, can it be defeated by an intermediate attachment? *Ibid.*

5. *Quære*, where a conveyance is made by one partner of his separate property to his private creditor, can a creditor of the firm, by an attachment laid before the deed of conveyance is recorded, defeat the prior title of such private creditor? If he may at law, can he in equity? *Ibid.*

6. *Quære*, as to the effect, both in law and equity, of an attachment made after the execution of a *bonâ fide* conveyance, and before the recording of it. *Ibid.*

7. The Act of Maine of 20th February, 1821, ch. 36, declares, that all deeds shall be good, as against third persons, only when "acknowledged by the grantor before a justice of the peace, in this State (Maine), or before a justice of the peace *or magistrate* in some other State, &c." *Held*, that an alderman of the city of Philadelphia, is a magistrate within the sense of the Statute, and that an acknowledgment before him will be sufficient.

Gordon v. *Hobart*. 401

8. *Quære*, if this Statute will protect mere strangers, who claim no title under the grantor, such as a disseizor, or no title in conflict with that held by the grantee, such as a mortgagee against a grantee, claiming the estate or equity of redemption by an unacknowledged or unregistered deed. *Ibid.*

9. If a deed is found in the possession of the grantee, there is a presumption of a due delivery thereof, because then, and not otherwise, it would be in the proper custody. *Flagg* v. *Mann*. 487

10. A deed can never be delivered as an escrow to the grantee himself. *Ibid.*

11. Where two persons are in possession of lands by an imperfect or tortious title, as by disseisin, a release to one of them will enure to the benefit of both. *Ibid.*

12. A disseisor in possession has a lawful estate, which he may alien, and his alienee will have a good title as against all persons not having a paramount title. *Ibid.*

See JURISDICTION, 4.

COSTS.

See CONSUL, 4.

COURT OF EXCHEQUER.

See EQUITY, 34.

COURTS OF THE UNITED STATES.

1. *Semble*, that in questions of commercial law, the courts of the United States are not concluded by the local construction proceeding from the State courts.

Donnell v. *Columbian Ins. Co.* 366

2. The courts of the United States are bound to take judicial cognizance of the laws of the different States.

Gordon v. *Hobart.* 404

3. The courts of the United States are not concluded in a matter of general Equity jurisdiction by a decision of the State Court.

Flagg v. *Mann.* 487

See BILL OF EXCEPTIONS, 1, 2.
CONVEYANCE, 3.
JURISDICTION, 1, 2, 3, 4, 5, 6.

CUSTOMS.

1. Usages among merchants should be sparingly adopted as rules of law by courts of justice, as they are often founded in mere mistake, and in a want of comprehensive views of the full bearing of principles.

Donnell et al. v. *Columbian Insurance Company.* 366

2. A usage or custom will be admitted, to ascertain the nature and extent of contracts, not arising from express stipulations, but from implications, presumptions, and acts of an equivocal character; or to ascertain the true meaning of particular words in a given instrument, when these words have various senses. But it will not be admitted to control, vary, or contradict a written and express contract.

The Schooner Reeside. 567

3. *Held*, that evidence is not admissible to vary the common bill of lading, by which the goods were to be delivered in good order and condition, the *danger of the seas only excepted*, by establishing a custom, that the owners of packet-vessels between New York and Boston, should be liable only for damage to goods, occasioned by their own neglect. *Ibid.*

DANGER OF THE SEAS.

See INSURANCE, 3, 4, 5, 7, 22.

DEBT, ACTION OF.

See CONSUL, 7.

DEEDS.

See CONVEYANCE, 8, 9, 10.

DEL CREDERE COMMISSION.

See INSURANCE, 21.

DELIVERY.

See CONVEYANCE, 9, 10.

DEVIATION.

See SHIPPING, 21.

DILATORY EXCEPTION.

See ADMIRALTY, 15.

DISSEISIN.

See CONVEYANCE, 8, 11, 12.
MORTGAGE, 3.

DOMICIL.

See JURISDICTION, 2, 3.

DUTIES.

1. Where whales are caught, and oil is manufactured, by the crew of an American vessel, the oil is not the product of "foreign fishing," within the purview of the Revenue Laws of the United States, though it has since been owned, and brought into port, by persons in a foreign service.

United States v. *Burdett.* 336

2. Appurtenances or equipments of a ship, as a chain cable, or other articles, purchased *bonâ fide* for the use of the ship, are not "goods, wares, or merchandise," within the meaning of the revenue Act of 1799, ch. 128, § 50, which require a permit before they are landed.

U. States v. *a Chain Cable.* 362

DISCHARGE.

See CHARTER-PARTY, 3.

ENDEAVOR TO COMMIT REVOLT.
See SHIPPING, 2, 3, 21, 25.

EQUITABLE MORTGAGE.
See EQUITY, 21, 24.

EQUITY.
1. If an owner stands by, and knowingly suffers an innocent person to be misled by his silence, and to purchase his property without giving him notice of his title, a Court of Equity will treat it as a fraud upon the purchaser, and grant an injunction against the future assertion of that title by the owner. *The Brig Sarah Ann.* 206

2. A general answer in Chancery overrules the pleas.
Taylor v. *Luther.* 228

3. Where the plaintiff, in his Bill in Chancery, directly charged upon the defendant, that he had made and entered into a certain agreement, a simple denial by the defendant in his answer "*according to his recollection and belief*," is insufficient, and must be treated as a mere evasion. *Ibid.*

4. A Court of Equity will not enforce a specific performance of a contract, as between the original parties, unless its terms are clear, definite, and positive; and *à fortiori*, where the specific performance is sought against an assignee.
Kendall v. *Almy.* 278

5. A party, to entitle himself to a specific performance of a contract, must show, that he has been always ready to perform his part of it.
Ibid.

6. "It is further agreed, that if Low & Fenner should redeem their one half of the aforesaid contract, by the payment of the drafts drawn on them by R. Hazard & Co. on account thereof, to return half of the aforesaid $5000 to said S. Almy, he relinquishing to said Low & Fenner all claim upon the aforesaid one half of the said contract." *Held*, that Low & Fenner, in order to derive benefit under the preceding clause, should have proceeded forthwith, or within a reasonable time, to make the redemption specified. *Ibid.*

7. The general rule of equity proceedings is, that after publication of the testimony, no new witnesses can be examined, and no new evidence can be taken, unless where the Judge himself, upon or after the hearing, entertains a doubt, or when some additional fact, or inquiry is indispensable to enable him to make a satisfactory decree. *Wood* v. *Mann.* 316

8. A witness may be examined to the mere credit of the other witnesses, whose depositions have been already taken and published in the cause, but he will not be allowed to be examined, to prove or disprove any fact, material to the merits of the case. *Ibid.*

9. The time for publication will be enlarged, or more properly, the time for taking the testimony will be enlarged, after publication has passed, though not in fact made, according to the rules of the Court, provided some good cause therefor is shown upon affidavit, as surprise, accident, or other circumstances, which repels any imputation of laches. The affidavit is indispensable, except in a case of fraud, practised by the other party. *Ibid.*

10. Exhibits in the cause may be proved after publication, and even *vivâ voce* at the hearing, when there has been an omission of the proof in due season, and they are applicable to the merits. *Ibid.*

11. Fresh interrogatories and a re-examination have been permitted after publication, where depositions have been suppressed from the interrogatories being leading, or for irregularity, or where it has been discovered, that a proper release has not been given, to make a witness competent. *Ibid.*

12. *Semble*, that new testimony

may be taken after publication to facts and conversations occurring after the original cause is at issue, and publication has passed. *Ibid.*

13. The Court may, in the exercise of a sound discretion, allow the introduction of newly discovered evidence of *witnesses* to facts in issue in the cause, after publication and knowledge of the former testimony, and even after the hearing. But it will not exercise this discretion to let in merely cumulative testimony. *Ibid.*

14. The same rule holds in cases of bills of review, and supplementary bills in the nature of bills of review. *Ibid.*

15. *Semble*, that the rule ought to be confined to cases of the discovery of new evidence of a *documentary* nature, and the testimony of witnesses, necessary to substantiate this. *Ibid.*

16. Upon a Bill of Revivor, the sole questions before the Court are, the competency of the parties, and the correctness of the frame of the bill to revive. *Bettes* v. *Dana.* 383

17. General objections to the original bill, grounded on its not showing a proper case for the interference of a Court of Equity, should be reserved till after the revivor of the bill. *Ibid.*

18. The administratrix of the defendant in the original bill, and his infant son and sole heir, are proper parties against whom a bill of revivor may be exhibited. *Ibid.*

19. The Equity jurisdiction of the Courts of the United States is independent of the local law of any State, and is the same in nature and extent, as the Equity jurisdiction of England, from which it is derived. Therefore, it is no objection to this jurisdiction, that there is a remedy under the local law.

Gordon v. *Hobart.* 401

20. Matters may be inquired into under a bill in Equity, notwithstanding they are open at law, where the bill is brought for other purposes, as for a discovery, an injunction to stay proceedings at law, and for other general relief upon the merits, which a court of law is incompetent to administer.

Gass v. *Stinson.* 454

21. On or about June 13th, 1823, Samuel Frye, as guardian of his minor children, under a license of Court, conveyed certain premises in Lowell, called the Paddy Camp Lands, to Luther Richardson, in fee. On the 14th of May, 1825, Luther Richardson conveyed these premises, being already subject to incumbrances, to his brother, Prentiss Richardson, by a deed of quitclaim, and upon a secret parol trust for the benefit of Luther. On the 6th of May, 1826, Luther Richardson and his wife, and Prentiss Richardson, executed a deed of quitclaim of the premises to Walker and Fisher, for the consideration of $2000 (as stated in the deed), and on the same day, Walker and Fisher executed a bond for $10,000 to Luther Richardson alone, which recites, that "the above-named Luther Richardson has, by a deed of quitclaim, bearing even date herewith, conveyed to the above-bounden Walker and Fisher, all his right and title, &c.," and then provides, that the obligees shall reconvey the premises to Luther Richardson whenever, within five years from date, he shall repay them such sums of money as they shall expend in discharging incumbrances, and making improvements on the land. At the same time, Walker and Fisher executed to Luther Richardson a lease of a part of the premises for five years, upon the annual rent of one cent during the term, unless the premises should be previously redeemed, according to the provisions of the bond. On or before the 13th of May, 1831, a claim was set up to these premises by the heirs of Samuel Frye, grounded on a supposed invalidity of the guardianship sale thereof at a former period.

Shortly after, a parol agreement was entered into between the plaintiff and the defendant Mann, to purchase at their mutual expense and benefit, the title of Luther Richardson, and to extinguish the claims of Walker and Fisher, and of the Frye heirs in the premises, on their equal and joint account. This agreement was never abandoned by the parties thereto. And on the 13th of May, 1831, Flagg and Mann, in pursuance thereof, received a conveyance of the premises by deed of quitclaim from Luther Richardson, and also an assignment of the bond of Walker and Fisher. On the 27th of July, 1831, Walker and Fisher conveyed their title in the premises to Mann alone, by a quitclaim deed. Subsequently, the Frye heirs, by deeds of quitclaim, conveyed all their title in the premises to the defendant, Adams. On the 6th August, 1831, the defendants, Mann and Adams, severally conveyed to each other, by quitclaim deeds, one moiety of the premises and of their respective interests therein. On the 8th of August, 1831, Mann conveyed, by a quitclaim deed, his moiety of the premises to the defendant Fuller, for $40,000, and Fuller, on the same day, executed a mortgage deed of the same moiety to Mann, as security for the payment of four notes, each for $10,000, given for the purchase-money. A bill in Equity was now brought, by Flagg, to set aside the deeds of Mann to Adams, and of Adams to Fuller, as made in fraud of the rights of the plaintiff, and for a reconveyance of one moiety of the premises to the plaintiff, upon payment by him of a moiety of the moneys paid in perfecting the title, and for other relief.

Held, That Luther Richardson has no interest in this suit, to render him an incompetent witness.

That the defect in Luther Richardson's original title, on account of the alleged invalidity of the guardianship sale, if such really existed, can be taken advantage of only by the Frye heirs, and others deriving title under them; and that, until the avoidance thereof by them, Luther Richardson must be deemed the lawful owner of the premises.

That the defendant, Mann, deriving his title, together with Flagg, from the purchase of Richardson, cannot set up the outstanding adverse title of the Frye heirs, to defeat the equitable rights of Flagg under the purchase on joint account, if Richardson at the time had any title in the premises.

That the agreement between Flagg and Mann being made for the purpose of protecting themselves against the claim of the Frye heirs, a Court of Equity will not allow Mann to violate that agreement by interposing the above claim to defeat the rights of Flagg, although the relation would not cause an estoppel at law.

That the execution of the deed to Walker and Fisher, and the giving of the bond by them to Luther alone, with the assent of Prentiss, amounted to an execution of the secret trust between Luther and Prentiss, and is the same in effect as if Prentiss had first conveyed the premises to Luther, and the latter had then conveyed to Walker and Fisher, taking from them the bond.

That Walker and Fisher, and all persons claiming under them, are estopped, at least in Equity, by the terms of the bond of Walker and Fisher to Luther Richardson, as above recited, from denying, that all which they took under the deed of Luther and his wife and Prentiss was the right and title of Luther alone.

That the deed to Walker and Fisher, and the bond by them to Luther Richardson are to be treated as part of one and the same transaction, and to have the same effect as if embodied in one instrument; and that this deed and bond, being

merely an attempt to evade the strict rules of law with regard to mortgages, constitute an equitable mortgage to Walker and Fisher for their advances, and not a conditional purchase by them of the premises.

That Luther Richardson had a clear Equity of Redemption in the premises. at the time of his conveyance to Flagg and Mann, sufficient, at least in the view of a Court of Equity, to make them tenants in common, and to create between them a privity of title and estate.

That the parol agreement between Flagg and Mann, for the purchase on joint account of the premises in question, as above recited, coupled with the deed of Richardson to Flagg and Mann, and the assignment to them of Walker and Fisher's bond, created a fiduciary relation between these parties, grounded on privity of title and estate, under which a purchase of an outstanding incumbrance or adverse title by one would be a trust for the benefit of both; and on this account, the agreement, though by parol, is extracted from the Statute of Frauds of Massachusetts.

Semble, that the agreement, though by *parol*, was executed by the passing of the deed, and assignment above-mentioned, even if no actual title passed from Richardson, so as to establish a fiduciary relation between the parties, grounded merely on privity of contract, which was sufficient to make the subsequent purchases of outstanding incumbrances in trust for the joint account, and to extract the case from the Statute of Frauds.

That Mann was entitled to one moiety of the premises, which moiety was duly conveyed to Adams, without notice of the title of Flagg.

That it was not of itself a wrongful act in Mann to take the title from Walker and Fisher, and from the Frye heirs in his own name, as it was his only security to compel Flagg either to abandon those purchases, or, if he insisted on his share, to repay the advances made.

That the charges of notice of the plaintiff's title in the bill against Fuller are loose and indeterminate, amounting to a mere intimation or suspicion or belief, whereas there should have been an allegation of full notice of the very title and claim of the plaintiff asserted in the bill.

That Fuller, at the time of his purchase of Mann, had no notice, actual or constructive, of the title of Flagg.

That the deed from Mann to Fuller, although a mere quitclaim or release, must be treated as a bargain and sale, or other lawful conveyance, effectual to pass the whole estate, and entitling Fuller to protection as a *bonâ fide* purchaser without notice to the extent of the purchase-money already paid before notice of the plaintiff's title.

That Flagg is entitled to one moiety of the premises purchased of Richardson, Walker, and Fisher, and the Frye heirs, and, in default of this, on account of the conveyance to Fuller, to a moiety of the purchase-money, as a substituted fund, deducting therefrom the sums paid by Mann to Walker and Fisher and to the Frye heirs, and other expenses incurred in the premises.

That for the payment of his moiety of the purchase-money, the plaintiff has a lien on the land conveyed to Fuller, to the extent of the purchase-money which remained unpaid at the time of notice to Fuller of the plaintiff's title.

Flagg v. *Mann*. 487

22. An allegation in an answer, which is not responsive to the bill, is not evidence; and the *onus probandi* is on the defendant to establish it. *Ibid.*

23. A question of fact, which is essential to the decision of a case in Equity, may be referred to a jury to be tried upon an issue framed for the purpose. *Ibid.*

24. A Court of Equity will often pronounce, that there is an equitable mortgage in cases, where a Court of Law would be compelled to say there was no mortgage. *Ibid.*

25. A trust, created by a parol contract, will be enforced in Equity against a party, who does not insist upon the defence of the Statute of Frauds. *Ibid.*

26. Courts of Equity do not regard the forms of instruments, but look to the intent, and give to the acts of parties that construction, which is consistent with the intent and with equity. *Ibid.*

27. A Court of Equity will not yield to technical rules of law, by which the intention of parties may be defeated. *Ibid.*

28. When a witness has been cross-examined by a party, with a full knowledge of an objection to his competency, a Court of Equity will not allow the party to raise the objection at the hearing. *Ibid.*

29. If a party would object to the competency or credibility of a witness in Courts of Equity, he must make a special application by petition to the Court for liberty to exhibit articles, stating the facts and objections to the witness, and praying leave to examine other witnesses to establish the allegations in the articles by suitable proofs; and upon this petition, leave is ordinarily granted by the Court. *Gass* v. *Stinson.* 605

30. *Semble*, that the application may be made by motion, upon the foundation of ignorance at the time of the examination.

31. An objection to the *competency* of a witness cannot be made after publication, if the incompetency was known before the commission to take this deposition issued.

32. An objection to the *credibility* of a witness, may be ordinarily made after publication and before hearing; but the interrogatories must be so shaped, as to prevent the party, under color of an examination to credit, from procuring testimony to overcome that already taken and published in the cause. *Ibid.*

33. The confessions, conversations, and admissions of the defendant need not be expressly charged in a bill in equity, in order to entitle the plaintiff to use them in proof of facts charged, and in issue therein. *Smith* v. *Burnham.* 612

34. The practice of the English Court of Chancery, and not that of the Court of Exchequer, forms the basis of the equity practice of the Courts of the United States. *Ibid.*

35. An interlocutory decree was made in Equity, by which the executors of A. Lewis, were chargeable with the sum of $1891,05 on account of rents and profits due to the plaintiff, Jesse Gordon. A petition was now filed, praying that a certain sum amounting to $1071,25, due from John Gordon, to the executors, might be set off against the foregoing sum; it being alleged that Jesse Gordon, the plaintiff, was a mere nominal party, and that John Gordon was the real party in interest, and was insolvent. It did not appear, that there was any mutual credit between A. Lewis and John Gordon, or express or implied agreement of set-off. *Held*, that the proceedings have passed that stage, when the claim of set-off could be entertained; that the question, whether Jesse Gordon was a nominal party or not, cannot be investigated in a collateral proceeding like the present; that the proper course would have been to file a cross bill at an earlier stage, or now to institute an original bill, in some competent Court; and that the insolvency of John Gordon does not *per se* constitute a sufficient equity to induce a Court of Equity to sustain the set-off. *Gordon* v. *Lewis.* 629

EQUITY.
See ADMIRALTY, 11, 12.
CONVEYANCE, 5, 6.
COURTS OF U. STATES, 3.
MASTER IN CHANCERY.
MILLS, 1.
MISTAKE 1, 2, 3.
MORTGAGE, 13, 16, 20, 21, 24, 25.
NOTICE, 3.
SET-OFF, 1, 2, 5, 6, 7, 10.
SURETY, 6, 8.

EQUITY OF REDEMPTION.
See MORTGAGE, 12, 21, 23.

ERROR, WRIT OF.
See NEW TRIAL, 7.

ESCROW.
See CONVEYANCE, 10.

ESTOPPEL.
See EQUITY, 21.

EVIDENCE.
1. The weight and character of circumstantial evidence.
United States v. *Gibert.* 19
2. The witnesses for the Government were allowed, with the chart of the Mexican's course before them, to be asked the question, Whether, under the circumstances stated of the supposed time of starting of both vessels, the Mexican and Panda would or would not be likely to meet at the point marked on the chart; *Held*, that this was a direct and proper question, and not leading. *Ibid.*
3. A question cannot be put to a witness, the relevancy of which does not appear. *Ibid.*
4. Where the Court instructed the jury, that certain confessions of the prisoners, reduced to writing, and not produced on the trial, ought to be disregarded by the jury, although they came out upon direct interrogatories of the cross-examining counsel for the defence; *Held*, if there was any error in this instruction, it was favorable to the prisoners, and that the suppression of the writings afforded no presumption of law, but of fact only in the case. *Ibid.*
5. If the persons, who made the confessions were not indentified, but the testimony, was only, that *some* did confess, not being named or identified, such confessions could not be applied to any particular prisoner as proof of his guilt, but might be considered by the jury, so far as they applied to the identification of the piratical vessel. *Ibid.*
6. The log-book is not proof *per se* of the facts therein stated, except in certain cases provided for by statute. *Ibid.*
7. It was proper to admit parol evidence to establish the time of the sailing of the Panda on her voyage, and to prove the course and termination of the voyage, without proving, that the log-book was missing or lost. *Ibid.*
8. The rule, requiring the production of the best evidence, is applied to reject secondary evidence, which leaves that of a higher nature behind in the power of the party; but not to reject one of several eye-witnesses to the same facts, for the testimony of all is in the same degree. *Ibid.*
9. *Quære*, if a party plaintiff of record, who has no interest in the suit, is a competent witness.
Levy v. *Burley.* 355
10. Where public officers are authorized by law to certify to certain facts, their certificates to these facts are competent evidence thereof. *Ibid.*
11. A party will not be allowed to give oral testimony to the contents or purport of an indictment, verdict or judgment; as the best evidence is the original paper or a certified copy.
Gass v. *Stinson.* 605
12. In the United States the usual questions asked, in order to discredit a witness, are what is the witness's general reputation for truth; is it good or bad? *Ibid.*

12. *Quære*, if a party, who cross-examines a witness, knowing his interest, does not thereby waive all right of objection. *Ibid.*

See ADMIRALTY, 9, 10.
CONSUL, 1, 2, 3.
CONVEYANCE, 2, 9.
EQUITY, 7, 8, 9, 10, 11, 12, 13, 15, 21, 22, 28, 29, 30, 31, 32.
INSURANCE, 10.
INTERPRETER.
MASTER IN CHANCERY, 8, 9, 10.
MORTGAGE, 17, 18, 19.
NEW TRIAL, 12, 13.
SURETY, 6.

EXCEPTION, DILATORY OR DECLINATORY.
See ADMIRALTY, 15.

EXCEPTIONS.
See MASTER IN CHANCERY, 1, 2, 6.

EXCEPTIONS, BILL OF.
See BILL OF EXCEPTIONS.

EXCHEQUER, COURT OF.
See EQUITY, 34.

EXHIBITS, PROOF OF.
See EQUITY, 10.

FELONY.
See BILL OF EXCEPTIONS, 3.

FORECLOSURE.
See MORTGAGE, 22, 23.

FRAUD.
See CONVEYANCE, 1.
EQUITY, 1.
MORTGAGE, 19.

FRAUDS, STATUTE OF.
See EQUITY, 21, 25.
MORTGAGE, 17.

FREIGHT.
See CHARTER-PARTY, 2, 3, 4, 5.
SHIPPING, 11, 12, 13.

FUGITIVES.
Semble, that, upon principles of international law, and independent of some statutable provisions or treaty stipulations, courts of justice are neither bound or authorized to remand prisoners for trial to a foreign government, whose laws they are supposed to have violated.
United States v. *Davis*. 482

HYPOTHECATION.
See BOTTOMRY BOND.

IMPRISONMENT.
See ADMIRALTY, 6.

INDICTMENT.
1. The indictment charged the piracy to have been committed "on the high seas, within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular State;" *Held*, that this was a sufficient statement of the *venue*, without any further specification of place.
United States v. *Gibert*. 19
2. A conclusion of an indictment against the form of the statute (in the singular) is sufficient in all cases, where the offence is distinctly within more than one independent statute. *Ibid.*
3. Also a conclusion against the form of the statutes (in the plural) would be good, even if the offence were punishable by a single statute only. *Ibid.*
See EVIDENCE, 11.

INFORMATION.
See CONSUL, 5, 7.

INJUNCTION.
See EQUITY, 1.

INSOLVENCY.
See SET-OFF, 4, 5, 8.

INNKEEPER.
An innkeeper would not be bound to entertain the agent of a rival inn,

who sought to decoy away his customers. *Jencks* v. *Colman.* 221

INSTRUCTIONS TO THE JURY.
See PRACTICE.

INSURANCE.
1. *Quære*—If underwriters are liable for a loss within the terms of the policy, occasioned by the negligent or improper conduct of the master or owners.
Potter v. *Suffolk Ins. Co.* 197

2. The underwriters on the common policy of insurance, are liable for all accidents arising from any extraordinary circumstances, and not from the inherent weakness of the vessel. *Ibid.*

3. Where an accident occurs in the ordinary course of grounding a vessel in a harbor, and there is no proof of inherent weakness, the loss must be attributed to some extraordinary cause, as the striking on some hard substance, or malposition, or overlaying the dock, which would be a peril of the sea, for which the underwriters would be liable. *Ibid.*

4. A ship, proved to have been stoutly built, and between two and three years old, and without any circumstance in the evidence to lead to the supposition, that she was rotten, or had at any previous period met with any calamity, having on board a small cargo, in a harbor, and at a wharf, which were usually safe for vessels of her tonnage, after taking the ground, was discovered to leak so badly, that surveyors were called, who, after a careful survey, reported the nature of her damage, and that "it was sustained by the said vessel lying badly on the ground." *Held*, that this loss cannot be attributed to any inherent weakness of the vessel, but to some extraordinary cause, and is within the perils of the sea, for which the underwriters are liable. *Ibid.*

5. The effect of the memorandum clause in policies is not to enlarge the perils underwritten against, but to exempt the underwriters from certain losses, within these perils. *Ibid.*

6. To constitute a stranding, within the policy, the vessel must be on the strand under extraordinary circumstances. *Ibid.*

7. A loss by the ebbing of the tide is a loss by the perils of the sea, if it be not mere wear and tear, but extraordinary in its nature or mode. *Ibid.*

8. An abandonment once made is considered as a continuing abandonment, notwithstanding a refusal to accept it, unless it is withdrawn by the party offering it.
The Brig Sarah Ann. 206

9. The master is the agent of all concerned in the voyage, and, whenever an abandonment has been accepted, becomes, by relation, the agent of the underwriters from the time of the loss, and a sale by him is then on account of the underwriters. *Ibid.*

10. There is no rule or presumption of law, which makes the seaworthiness of a vessel at the commencement of the voyage *primâ facie* evidence, that the subsequent repairs, necessary to be made during the voyage, arose from some extraordinary peril. Otherwise, the underwriters might be made liable for losses for mere wear and tear.
Donnell v. *Columbian Ins. Co.* 366

11. The necessity of repairs, in the course of the voyage, on account of mere wear and tear, does not impair the original warranty of seaworthiness. *Ibid.*

12. In a policy of insurance, it was stipulated, that the underwriters shall not be liable "for any partial loss on other goods, or on the vessel and freight, unless it amount to five per cent. exclusive *in each case* of all charges and expenses incurred for the purpose of ascertaining and proving the loss;" *Held*, that the words "in each case," in the fore-

going clause, do not mean "at each time of loss," but that they refer to the three several subjects insured, goods, freight, and vessel, and require a damage of five per cent. to justify a claim in each case. *Ibid.*

13. *Held*, that successive losses on the *cargo*, in the course of the voyage, each less than five per cent.; but in the aggregate amounting to more than five per cent., are not within the exception, and are to be borne by the underwriters. *Ibid.*

14. *Semble*, that the same rule prevails with regard to losses on the *ship*. *Ibid.*

15. *Semble*, that this rule prevails among the commercial States of the continent of Europe. *Ibid.*

16. *Quære*—If a distinction exists between successive losses by the same peril in the same voyage, and successive losses by different perils in the same voyage. *Ibid.*

17. *Semble*, that a recovery may be had upon a policy of insurance on a ship or cargo for a certain voyage, where the loss has already occurred at the time of executing the policy, and is unknown to both parties, even though the policy does not contain the common words "lost or not lost."

Hammond v. *Allen*. 387

18. Where an insurance was effected by an agent, for the benefit of whom it concerned, and a loss was incurred, and the agent brought an action against the underwriters in his own name, for the benefit of the owners of the ship, *held*, that underwriters could not set off debts or demands due from the agent in his own right, against the amount claimed for the loss.

Hurlbert v. *Pacific Ins. Co.* 471

19. A policy of insurance, wherein the underwriters insured Z. Cook, Jr. for E. D. Hurlbert & Co. for whom it concerns, payable to E. D. Hurlbert & Co., contained the following clause; "And in case of loss, such loss shall be paid in sixty days after proof and adjustment thereof, the amount of the premium note, if unpaid, and all sums due to the company *from the insured*, when such loss becomes due, being first deducted." An action was brought in the name of E. D. Hurlbert & Co., agents for the benefit of the owners of the ship. *Held*, that the premium note was to be deducted, whether given by the agent or principal, and that the words, *the insured*, applied not to the party, who procured the insurance, but to him for whose benefit it was made, as the owners in the present case. *Ibid.*

20. *Quære*, if the principal, in the policy above-mentioned, could, with the consent of the agent, sue at common law in his own name. *Ibid.*

21. *Quære*, if a broker, who acts under a *del credere* commission, may be considered as the primary debtor to his principal, and, therefore, to all intents, the insured. *Ibid.*

22. Losses by "danger of the seas" are such as are of an extraordinary nature, or arise from irresistible force, which cannot be guarded against by the ordinary exertions of human skill and prudence. The mere rolling of a vessel by a cross sea is not such a danger.

The Schooner Reeside. 567

See BOTTOMRY BOND, 9.
SHIPPING, 20.

INTEREST.
See MORTGAGE, 7, 8, 9.

INTERNATIONAL LAW.
See FUGITIVES.

INTERPRETER.
A sworn interpreter may take advantage of the suggestions of others, who are not sworn, with regard to the proper interpretation of testimony, stating the result to the Court as his own interpretation.

United States v. *Gibert.* 19

JEOPARDY OF LIFE OR LIMB.
See NEW TRIAL, 1, 2, 3, 4, 5, 6.

JOINDER.
See ADMIRALTY, 7.

JUDGMENT.

1. *Held*, that the Acts of New Hampshire of 1808, and 1830, on the subject of the liability of administrators, upon joint contracts and joint demands against the estate of a deceased debtor (when the other debtor survived), do not apply to a suit on a joint judgment, whatever might be the case, as to a suit on the original contract or demand. *U. S.* v. *Cushman*. 310

2. *Semble*, that a joint judgment is no bar at law to a separate suit against one of the obligors on a joint and several bond, or against his personal representatives. The joint judgment only bars the joint remedy in such case, and not the several remedy. *Ibid.* 426

3. Where a judgment was obtained upon a joint and several bond, for duties at the Custom House, in a joint suit against all the obligors; and afterwards, one of the obligors died; it was *held*, that no action at law lay against the administrator of the deceased obligor, but only against the surviving judgment debtors. *Ibid.* 310.

See MORTGAGE, 22.
SET-OFF, 8.

JUDGMENT, ARREST OF.

See ARREST OF JUDGMENT.

JURISDICTION.

1. The Circuit Court of the United States cannot entertain a bill of revivor, where the controversy, which it seeks to revive, is now between citizens of the same State, though the parties to the original bill, were citizens of different States. As where a bill of revivor was brought by an administrator, who was a citizen of the same State with the defendant, though his intestate was of a different State.

Clarke v. *Matthewson*. 262

2. Where the parties are citizens of different States, at the commencement of the suit, a subsequent change of domicil and citizenship will not oust the jurisdiction. *Ibid.*

3. If a citizen removes from one State to another, in order to prosecute suits in the Courts of the United States, provided the removal be real, the motive of the act cannot be inquired into.

Briggs v. *French*. 252

4. The Judiciary Act of 1789, ch. 20, § 11, contains the following exception; "Nor shall any District or Circuit Court have cognizance of any suit, to recover the contents of any promissory note, or other chose in action, in favor of an assignee, unless a suit might have been prosecuted in such Court to recover the said contents, if no assignment had been made, except in cases of bills of exchange;" *Held*, that this does not apply, either directly or constructively, to a conveyance of lands from a citizen of one State to a citizen of another State. *Ibid.*

5. *Quære*, as to the authority of the cases, *Maxwell's Lessee* v. *Levy*, (2 Dall. R. 381, S. C. 4 Dall. R. 330) and *Hurst's Lessee* v. *McNeil* (1 Wash. C. C. R. 70, 83). *Ibid.*

6. A gun was fired from an American ship, lying in the harbor of Raiatea, one of the Society Isles and a foreign government, by which a person on board a schooner, belonging to the natives and lying in the same harbor, was killed. *Held*, that the act was, in contemplation of law, done on board the foreign schooner, where the shot took effect, and that jurisdiction of it belonged to the foreign government, and not to the Courts of the United States under the Crimes Act of 1790, ch. 36, § 12.

United States v. *Davis*. 482

7. *Quære*, if the waters of the harbor of the island of Raiatea are to be deemed the high seas.

See ADMIRALTY, 2, 5, 11, 14, 17.
BOTTOMRY BOND, 2.
CONVEYANCE, 3.
EQUITY, 19, 20.
INDICTMENT, 1.
MORTGAGE, 20.

JURY.
The jury have not the right, though they may have the power, in rendering a general verdict, to determine the law in any case, civil or criminal. It is their duty to follow the law as laid down by the Court.
United States v. *Battiste.* 240
See EQUITY, 23.
NEW TRIAL, 1, 2, 9, 10.
PRACTICE.

JUSTIFICATION.
See ADMIRALTY, 1.

LAPSE OF TIME.
See ADMIRALTY, 12, 13.
MORTGAGE, 24.

LIEN.
See ADMIRALTY, 14, 17.
ATTORNEY, POWER OF.
BOTTOMRY BOND, 5.
CHARTER-PARTY, 25.
SHIPPING, 12.

LIBEL IN ADMIRALTY.
See ADMIRALTY, 1, 5, 7, 8.

LIBEL.
1. A promise to indemnify another for doing a private wrong, or committing a public crime, is against public policy, and is void in law. Therefore, a promise to indemnify the publisher of a libel is void.
Arnold v. *Clifford.* 238
2. The liberty of the press does not sanction the publication of libels. *Ibid.*

LIBERTY OF THE PRESS.
See LIBEL, 2.

LIS PENDENS.
See ADMIRALTY, 15, 16, 17.

LIMITATIONS OF ACTIONS.
See ADMIRALTY, 12, 13.
MORTGAGE, 24.

LOCALITY.
See ADMIRALTY, 2.

LOG-BOOK.
See EVIDENCE, 6, 7.

MALICE.
See SHIPPING, 22.

MAGISTRATE.
A magistrate is a person entrusted with power, as a public civil officer. *Gordon* v. *Hobart.* 404

MARINER'S WAGES.
See SHIPPING, 9, 10, 11, 12, 13, 19.

MASTER.
See BOTTOMRY BOND, 3.
INSURANCE, 1, 9.
SHIPPING, 1, 4, 5, 6, 7, 8, 22, 23, 24, 26, 27.

MASTER IN CHANCERY.
1. In exceptions to a Master's Report, a general assignment of errors is insufficient, unless specific errors are shown.
Dexter v. *Arnold.* 108.
2. The Master was right in refusing to inquire into the original consideration of a mortgage, when this mortgage, in an account settled between the parties, was treated as a good subsisting mortgage for the full amount stated therein, and when the bill did not charge that the consideration was nominal, or that there was any mistake therein, or ask for any examination thereof. *Ibid.*
3. Exceptions to a Master's Report must be founded on the facts stated in the Report, or in the accompanying documents and proofs. *Ibid.*
4. The Master was right in refusing to open an account settled in 1801, as no leave was given to surcharge and falsify that account, and there were circumstances, which shewed, that the account had already been adjudicated in a former suit by this Court. *Ibid.*
5. The Master was right in charging the estate of the mortgagee with the money received, as the consideration, on giving an absolute deed of the mortgaged premises. *Ibid.*

6. Whatever has been insisted upon before the Master is considered as waived or abandoned, if it is not made matter of exception; unless it appears on the face of the report, that the master has committed an error.

Gordon v. *Lewis*. 143

7. Where the answer of the defendants asserts a mortgage title in the whole of the premises, it is not competent for them to set up a different title, as for a moiety, before the Master. *Ibid.*

8. A party should require the Master, or Auditor, to report specially such evidence, as furnishes the ground of any exception. And the Court will not open the facts of the report, unless to correct some unquestionable error.

Donnell v. *Columbian Ins. Co.* 366

9. If a cause, by an interlocutory decree, has been referred to the Master, and either party desires to take the testimony of witnesses in order to establish the incompetency of a witness, who has already been examined in the cause, and whose deposition was before the Court, when the decretal order was passed, the application to the Master must be by petition in writing, verified by affidavit.

Gass v. *Stinson*. 605

10. If the application be founded on a suggestion, which is incorrect in point of fact, the order to take the testimony, which was made thereon, will be superseded. *Ibid.*

11. After the hearing and interlocutory decree, a party cannot object before the master to the credibility of a witness, whose testimony was read at the hearing without objection. *Ibid.*

12. A witness, who has given his deposition, which has been read at the hearing, cannot be examined anew before the Master, without a special order of the Court. *Ibid.*

See MORTGAGE, 4, 5.

MEMORANDUM CLAUSE.

See INSURANCE, 5.

MERCHANTS.

See CUSTOMS.

MILLS.

1. A Bill of Equity, after a decree, in certain cases may be retained for further future proceedings; but, in the case of an alleged violation of a water privilege, it will not be retained, in order to give the plaintiffs an opportunity, by new trials and proofs, to establish the fact, that a further lowering of the dam of the mill of the defendants is necessary to the protection of their rights.

Mann v. *Wilkinson*. 273

2. *Quære*, whether, under the Mill Act of Rhode Island, a mill-owner may raise his dam, so as to affect any water privilige or dam already on the stream, and above his own mill. *Ibid.*

MISDEMEANORS.

See BILL OF EXCEPTIONS, 3.

MISTAKE.

1. The plaintiff, having a large claim against the government of Portugal, appointed the defendant his Attorney, "with power irrevocable," to demand and recover the same, and on 27th January, 1832, entered into an agreement with the defendant to allow him a large sum as commissions on his agreeing to use his utmost efforts for the recovery thereof. At the time this agreement was made, though wholly unknown to both parties, the Government of Portugal, by a treaty stipulation dated 19th Jan. 1832, had allowed and liquidated the plaintiff's claim, so that nothing further remained to be done in the premises. *Held*, that this was a case of mutual mistake going to the substance of the contract and making it void, or

voidable in Equity; and a decree was accordingly made that the agreement above-mentioned be delivered up and cancelled, and that a perpetual injunction issue to prohibit the defendant from asserting any title at law or equity under the same.

Hammond v. *Allen.* 387

2. In the case above-mentioned nothing but a clear and unequivocal ratification of the agreement after full deliberation and a complete review of all the material circumstances, would be held satisfactory by a Court of Equity. *Ibid.*

3. A mistake of facts going to the essence of a contract avoids it. *Ibid.*

MONOPOLY.

See COMMON CARRIERS, 3. MORTGAGE, 17.

MORTGAGE.

1. A mortgagee is bound to make all reasonable and necessary repairs upon the mortgaged premises while in his possession, and will be responsible for the damage occasioned by any wilful default or gross neglect in this respect. The natural effects of waste and decay, from time, he will not be bound to repair. *Dexter* v. *Arnold.* 108

2. *Quære*, if a mortgagee, who lays out money in permanent repairs for the benefit of the estate, may claim an allowance therefor. *Ibid.*

3. An absolute deed of mortgaged premises given by the mortgagee operates as a conveyance of a defeasible title only, and not as a disseisin, as between the mortgagor and mortgagee. *Ibid.*

4. A mortgagee, who keeps no accounts of the rents and profits received by him, is properly chargeable with what he may be presumed to have received, and, if in the occupation of the premises, also with an occupation rent. And the Master was right in embracing all these items in an account of rents and profits *received.* *Ibid.*

5. Where a mortgagee has kept no accounts of the rents and profits received by him, the Master will exercise a sound discretion upon the whole evidence with regard to the amount for which he should be charged, without resorting to the standard of an occupation rent. *Ibid.*

6. Where the defendant recovered and occupied premises, as assignee of the original mortgagee, he must be deemed to have received the rents and profits under that title; and he cannot set up an adverse title against the mortgagor or his assignees, to protect himself from accountability therefor.

Gordon v. *Lewis.* 143

7. Where a mortgagee is in possession, and the annual rents and profits, of the mortgaged premises exceed the interest of the debt due, it *seems*, that he should pay interest on the surplus rents and profits. *Ibid.*

8. In ordinary cases, where the relation of mortgagor and mortgagee is uncontroverted, if a mortgagee receive the rents of a mortgaged estate, after his debt has been satisfied, and retain them to his own use, without paying them over to the mortgagor, he is chargeable with interest. *Ibid.*

9. If, however, there are sufficient equitable circumstances in favor of the mortgagee, as if he retained the rents under a mistake, supposing the rights of the mortgagor extinguished, he would not be liable for interest, until after notice of the adverse claim. *Ibid.*

10. No allowance is made for expenditures on mortgaged premises, if the value of the premises is not enhanced thereby. *Ibid.*

11. The surplus rents and profits, after the satisfaction of the mortgage debt, may be assigned as a *chose in action*, and the assignee maintain a suit in equity for an account.

Gordon v. *Lewis*, 143

12. In the view of a Court of Equity, the rents and profits are incidents *de jure* to the ownership of the Equity of redemption. *Ibid.*

13. A second mortgagee, after the satisfaction of the first mortgage, may claim from the first mortgagee, after notice, the rents and profits, which have not been accounted for to the mortgagor, so far as the same are necessary to the satisfaction of his mortgage. *Ibid.*

14. A mortgagee shall not get any advantage out of the mortgage fund beyond principal and interest. *Ibid.*

15. Between mortgagor and mortgagee, the latter, when in possession, must account for the actual rents and profits, if they can be ascertained; if they cannot be, then resort may be had to a fair occupation rent. *Ibid.*

16. Webb mortgaged certain premises in 1808, to Haskell; Haskell in 1816 assigned his mortgage to the defendant Lewis; Lewis in 1831 assigned the same to the Portland Manufacturing Co The mortgagor Webb in 1812, conveyed the mortgaged premises to John Gordon, who, in 1832, conveyed the same to the plaintiff. *Held*, that no decree can be made for the payment of the rents and profits to the plaintiff, until an opportunity has been given by supplemental proceedings for Webb and the other parties in interest to appear. *Ibid.*

17. There is nothing in the Statute of Frauds in Rhode Island (which is a copy of the English Statute, 29 Car. 2, ch. 3, § 4), rendering parol evidence inadmissible, to show, that an absolute deed was intended as a mortgage, and that the defeasance has been omitted or destroyed by fraud or mistake, or omitted by design, upon mutual confidence between the parties.
Taylor v. *Luther*. 228

18. The grantors, in deeds of release and quitclaim, are competent witnesses to show, that their estate was not absolute, but a mortgage, of which their grantees had notice at the time of the conveyance to them. *Ibid.*

19. *Semble*, that the grantor, as well as the grantee, if not otherwise interested, is a competent witness, to establish the original deed to be fraudulent. *Ibid.*

20. The Act of Maine, of 5th February, 1821, ch. 39, § 1, requiring a tender, in certain cases, to be made of money due upon a mortgage, respects suits in the State Court only, and does not apply to the general equity jurisprudence of the Courts of the United States.

Quære, as to the cases, to which this statute is applicable.
Gordon v. *Hobart*. 401

21. *Quære*, if the purchasers of an Equity of redemption can take the objection, that the mortgage was upon a usurious consideration, or, as plaintiffs, can have any relief in Equity, without offering to pay the amount due. *Ibid.*

22. A judgment of foreclosure was recovered by the executrix of the mortgagee, in 1826, in a suit against the original mortgagor. Long before this judgment, viz. in 1819, the mortgagor had assigned all his title to redeem the premises to two other persons, under whom the plaintiffs derived their title. *Held*, that this judgment can operate as a bar or estoppel only between the particular parties to it and their privies, and is *res inter alios acta* and inoperative, as regards the plaintiffs, and that the possession under it is not subversive of their right to redeem. *Ibid.*

23. The Act of Maine of 5th February, 1821, ch. 39, provides that the right of redemption of the mortgagor, and all claiming under him, may be foreclosed by the mortgagee's taking peaceable and open possession of the premises mortgaged for the condition broken, in the presence of two witnesses. *Held*, that the possession, under the writ of possession, in the presence of the

sheriff delivering, and the agent receiving it, was not a possession in the presence of two witnesses, in the sense of the Statute, by which the plaintiff's rights are foreclosed. *Ibid.*

24. A mortgagee will not be permitted in a Court of Equity to set up an adverse possession to bar the right to redeem of his mortgager, or of purchasers under him, unless the possession has been for twenty years, which constitutes an equitable bar from lapse of time. *Ibid.*

25. If a transaction resolve itself into a security, whatever may be its form, and whatever name the parties may choose to give to it, it is in equity a mortgage; and the parties cannot, by any covenant or agreement, limit the rights of the mortgagor, or cut off his Equity of Redemption after a limited period. *Flagg* v. *Mann.* 487

26. The circumstance, that the grantee is not to be let into immediate possession of the estate, affords a presumption of its being a mortgage; so also does the circumstance, that the money paid by the grantee is not a fair price for the absolute purchase of the property conveyed to him. *Ibid.*

27. It is not of the essence of a mortgage, that there should be a defeasance; and there may be a defeasance of a deed of conveyance, without constituting a mortgage. The question, whether a conveyance amounts to a mortgage, does not turn on this point. *Ibid.*

28. *Quære*—If a bond given by a grantee to one of several grantors, in order to defeat and make void the conveyance, if executed at the same time with the conveyance, will amount to a technical defeasance. *Ibid.*

29. The essence of a defeasance is to defeat the principal deed, and make it void *ab initio*, if the condition be performed. *Ibid.*

See MASTER IN CHANCERY, 2, 5, 7.

MORTGAGE OF PERSONAL PROPERTY.

See BOTTOMRY BOND, 6.
EQUITY, 21, 24.

MURDER.

Convictions for murder may take place when the murdered body is not found.

United States v. *Gibert.* 19

See PIRACY, 5.

NEW TRIAL.

1. The prohibition in the Constitution of the United States, "Nor shall any person be subject, for the same offence, to be twice put in jeopardy of life or limb," means that no person shall be tried a second time for the same offence, after a trial by a competent and regular jury, upon a good indictment, whether there be a verdict of acquittal or conviction. Therefore, the Circuit Court of the United States cannot grant a new trial in a capital case, after a verdict regularly rendered upon a sufficient indictment. *Davis* J. dissenting, held that the privilege intended to be secured by the prohibition, might be waived by the prisoner. *Quære*—If this prohibition extends to the State courts?

United States v. *Gibert.* 19

2. A new trial may be granted in a capital case, where the jury has been discharged from giving a verdict; for then the party has not been put in jeopardy of his life. *Ibid.*

3. The prohibition in the Constitution is a recognition of an old maxim of the common law, and, therefore, we are to resort to the common law to ascertain its true meaning. *Ibid.*

4. There is no instance of a new trial granted by the English Courts in capital cases where the indictment was sufficient, and there has not been a mis-trial. *Ibid.*

5. *Quære*—If the courts of the United States may grant new trials in cases of misdemeanors. *Ibid.*

6. *Quære*—If Congress may invest the courts of the United States with the power to grant new trials in all criminal cases, capital and otherwise. *Ibid.*

7. A writ of error does not lie at the common law for the refusal of a Court to grant a new trial. *Ibid.*

8. According to the Constitution of the United States, "No fact, once tried by a jury, shall be otherwise re-examined than according to the rules of the common law;" therefore, independent of the express prohibition of the Constitution, there can be no new trial, in a capital case, after a regular trial once had upon a good indictment. *Ibid.*

9. Where the officers, attending upon the jury, under a mistake of duty, permitted them to read the newspapers,—the officer first inspecting them, and cutting out every thing, that in any manner related to the trial,—and it appeared, that in point of fact the jury never saw any thing in any newspaper relative to the trial, and, after the charge from the Court were not allowed to see any until they had delivered their verdict, *Held*, that it was an irregularity in the officer, but not sufficient to justify the Court in setting aside a verdict, and granting a new trial, or treating the matter as a mis-trial. *Ibid.*

10. Nor would it be sufficient for this purpose, to show, that some of the jurors drank ardent spirits during the trial, when the prisoner's counsel consented in open Court to this indulgence to those whose health might require it, unless it was shown, that the indulgence was grossly abused, and operated injuriously to the prisoners. *Ibid.*

11. Where the prisoners were placed within the bar, and within a reasonable distance from their counsel, who could constantly have free access to them, and to whom the Court stated, that every delay of time for that purpose would be cheerfully given, and it was given; *Held*, that to place the prisoners in the very front benches of the bar, by the side of their counsel, would have been an indulgence inconvenient and unnecessary, and that the Court did not err, under the circumstances of the case, in refusing it. *Ibid.*

12. The Court did not err in refusing to have the order of the prisoners (twelve in number) changed, before the introduction of each of the witnesses for the Government, who were excluded from the court-room, and after the first of these witnesses had been examined and had retired. *Ibid.*

13. It would be improper to grant a new trial, on the ground of newly-discovered evidence, proceeding from persons, who were charged as joint offenders with the prisoners, and were incompetent at the time of the trial, but have been acquitted. *Ibid.*

See BILL OF EXCEPTIONS, 4.

NEWLY DISCOVERED EVIDENCE.

See NEW TRIAL, 13.

NEWSPAPERS.

See NEW TRIAL, 9.

NEUTRAL SHIP, CAPTURE OF.

See SHIPPING, 9, 14.

NOTICE.

1. Vague reports and rumors from strangers, and suspicion of notice, though a strong suspicion, are not sufficient ground, on which to charge a purchaser with notice of title in a third person.

Flagg v. *Mann.* 487

2. *Semble.* Possession by a tenant of an estate at the time of its purchase, is constructive notice to the purchaser of the tenant's title, though not of the title of the lessor, or of the party, under whom the tenant claims. *Ibid.*

3. Courts of Equity in the United

States, where the registration of deeds is universally provided for, should not enlarge the doctrine of constructive notice, or follow all the English cases on the subject, without a due regard for the circumstances and laws of our country. *Ibid.*

See EQUITY, 21.
SURETY, 5, 8.

OCCUPATION RENT.
See MORTGAGE, 4, 5, 15.

PAROL EVIDENCE.
See EVIDENCE, 7.
MORTGAGE, 17.

PARTIAL LOSSES.
See INSURANCE, 12.

PARTIES.
See EVIDENCE, 9.
INSURANCE, 20.
MORTGAGE, 16.

PARTNERSHIP.
See SET-OFF, 3, 5.

PAYMENT INTO COURT.
A payment of money into Court admits the contract and damages only *pro tanto;* and if the plaintiff does not establish more at the trial, he must be nonsuited, or have a verdict against him.
Donnell v. *Columbian Ins. Co.* 366

PERIL OF THE SEA.
See INSURANCE, 3, 4, 5, 7, 22.

PERSONAL PROPERTY, MORTGAGES OF.
See BOTTOMRY BOND, 6.
EQUITY, 21, 24.

PIRACY.
1. In order to affect all the officers and crew of a piratical vessel with guilt, the original voyage must have been undertaken with a piratical design, and the officers and crew have known and acted upon such design; otherwise those only are guilty, who actively co-operated in the piracy. *U. S.* v. *Gibert.* 19
2. It would not be sufficient to affect them with guilt, if they had known, that the voyage was intended to be an illegal one, as in the slave trade, contrary to the laws of Spain. *Ibid.*
3. The simple fact of presence on board the piratical vessel, where there was no original piratical design, is not sufficient *per se* to affect a party with the crime. *Ibid.*
4. All who are present, acting and assisting in the piracy, are to be deemed principals. *Ibid.*
5. The Crimes Act of 1790, ch. 9, § 8, (as well as the act of 1820, ch. 113) applies to all murders and robberies committed on board of or upon American ships on the high seas. *Ibid.*
See INDICTMENT, 1.

PLACE.
See ADMIRALTY, 5.

PLEADING.
1. In cases of tort, the plaintiff may elect to make his action joint, or several; and no defendant can take away this election.
Smith v. *Rines.* 538
2. A severance of a suit, so as to make two several suits out of one joint suit, is not allowed at the common law as to parties defendant. *Ibid.*
See ADMIRALTY, 1, 5, 6, 8, 9, 10, 15, 16.
EQUITY, 2, 3.
INSURANCE, 20.

POWER, COUPLED WITH AN INTEREST.
See ATTORNEY, POWER OF.

POWER OF ATTORNEY.
See ATTORNEY, POWER OF.

PRACTICE.
The practice in this Court in capital cases is for counsel to state the points of law, on which they wish

instructions to the jury, at some time before the charge is given, that the Court may have time to examine and consider them.
United States v. *Gibert.* 19

PRESUMPTION OF FACT.
See EVIDENCE, 4.
ADMIRALTY, 8, 9, 10, 15.

PRICE.
See SALE, 3.

PROCEEDS.
See SHIPPING, 12.

PROPRIETORS OF PROVIDENCE AND NEW YORK STEAMBOATS.
See COMMON CARRIERS, 1, 2, 3.

PUBLIC POLICY.
See LIBEL.

PUBLICATION OF TESTIMONY.
See EQUITY, 7, 9, 10, 12, 13, 31, 32.

PURCHASER, *BONA FIDE.*
1. In a plea of a purchase for a valuable consideration without notice of the plaintiff's title, it is necessary to aver, that the person, who conveyed, was seised, or pretended to be seised, at the time when he executed the purchase deeds.
Flagg v. *Mann.* 487

2. *Semble.* If a *cestui que trust* in fee conveys the estate to a purchaser, and the trustee afterwards confirms the sale, and releases to the *cestui que trust*, or to the purchaser, such a purchaser is entitled to protection against any antecedent secret trust, which was unknown to him at the time of the purchase and the confirmation, although, in a strict sense, the *cestui que trust* was not seised of the estate at the time of the conveyance. *Ibid.*
See BOTTOMRY BOND, 7.
EQUITY, 21.
NOTICE, 1, 2.

RATIFICATION.
See MISTAKE 2.

RECEIPT BY SEAMEN.
See ADMIRALTY, 6.

REGISTRATION.
See BOTTOMRY BOND, 6.
CONVEYANCE, 1, 4, 5, 6.
NOTICE, 3.

RELEASE.
See CONVEYANCE, 11.
MORTGAGE, 18.

REMOVAL OF SUIT.
1. The language of the Judiciary Act of 1789, ch. 20, § 12, though in its terms it applies only to the case of a single defendant, must be applied to the party defendant, whether one or many, so as to embrace cases, where several aliens, or several citizens of another State, are jointly sued as defendants.
Smith v. *Rines.* 338

2. According to the section above-cited, such cases only are liable to removal from the State to the Circuit Court, as might, under the law or constitution of the United States, have been brought before the Circuit Court by original process. *Ibid.*

3. In order to remove a cause from the State to the Circuit Court, under the Judiciary Act of 1789, ch. 20, § 12, all the defendants must join in the petition for the removal. And a cause cannot be removed as to some defendants, and left depending in the State Court as to others. *Ibid.*

4. *Quære*—as to the remedy, where the provisions of the act above-cited are evaded, by a fraudulent joinder of nominal defendants, in order to prevent a removal of the suit. *Ibid.*

RENTS AND PROFITS.
See MORTGAGE, 4, 5, 6, 7, 8, 9, 11, 12, 13, 15, 16.

REPLEVIN.
See ADMIRALTY, 17.

REVIEW, BILLS OF.
See EQUITY, 14.

REVIVOR, BILLS OF.
See EQUITY, 16, 17, 18.
JURISDICTION, 1.

REVOLT, ENDEAVOR TO COMMIT.
See SHIPPING, 2, 21, 25.

ROBBERY.
See PIRACY, 5.

SALE.
1. A valid sale may be made of personal goods, which are out of possession, and the sale will be of the thing itself, and not of a mere *chose in action*.
The Brig Sarah Ann. 206
2. To constitute a conditional purchase, there must be a sale for a valuable consideration between the parties, with a right of repurchase.
Flagg v. *Mann.* 487
3. *Semble*, that it is of the essence of the contract of sale, that there should be a fixed price for the purchase. *Ibid.*
See SHIPPING, 4, 6, 7, 8.

SALE AND RETURN.
See SURETY, 3.

SEAMAN.
See ADMIRALTY, 5.
SHIPPING, 9, 10, 11, 12, 13, 14, 15, 16, 17, 19, 20, 23, 26.

SEAWORTHINESS.
See INSURANCE, 10, 11.
SHIPPING, 2, 3.

SET-OFF.
1. Courts of Equity follow the law in matters of set-off, unless there is some Equity attaching to the particular transactions between the parties. *Gordon* v. *Lewis.* 143
2. Courts of Equity follow the law in regard to matters of set-off, unless there is some intervening natural equity going beyond the statute of set-off, as where there are mutual credits between the parties, or an existing debt on one side, which constitutes the ground of a credit on the other side.
Howe v. *Sheppard.* 409
3. Joint debts cannot be set off against separate debts, or separate debts against joint debts, either at law or in equity; as where there is a separate debt due from a partner, and a joint debt due to the partnership. *Ibid.*
4. *Quære*—If in a case of mutual credits and debts *in the same right*, the insolvency of either party will create such an equity as to entitle the other party to a set-off against the debt of the insolvent party. *Ibid.*
5. *Semble.* That a Court of Equity will not entertain a set-off of a separate debt of one partner against a joint debt to the partnership, upon the ground of the insolvency of that partner. *Ibid.*
7. The mere fact, that a case is in conformity with the principles of natural equity and justice is not sufficient to bring it within the jurisdiction of a court of equity. There are many principles of natural equity and justice, which are not attempted to be enforced therein. *Ibid.*
7. Where there are mutual debts, which may be set off at law or in equity, the right of set-off is extinguished by a *bonâ fide* assignment of one of the debts. *Ibid.*
8. Howe & Howard recovered a joint judgment against Wood in 1821; Howe, for himself, and as attorney of Howard, on the 22d of September, 1830, assigned the judgment to the United States, and Howard, on the 30th of October, 1830, surrendered all his interest therein to Howe, and authorized him to transfer and assign the same

for his own benefit. *Held*, that there was a valid assignment of the joint judgment to the United States, and that the defendant, who was the administrator of Wood, could not set off against it a debt due by Howe alone to Wood, though Howe, ever since the debt accrued, had been insolvent. *Ibid.*

9. The right of set-off is limited, at the common law, to cases of mutual connected debts, and does not extend to debts, which are unconnected with each other.

Hurlbert v. *Pacific Ins. Co.* 471

10. In matters of set-off, Equity follows the law; and the fact of the existence of mutual demands, without some intervening equity between the parties, would not justify a Court of Equity in allowing a set-off. *Semble*, that the mere insolvency of one of the parties, does not constitute such an equity.

Gordon v. *Lewis.* 628

See INSURANCE, 18, 19.

SEISIN.

See PURCHASER, *bonâ fide.*

SEVERANCE.

See PLEADING, 1.

SHIPPING.

1. A master of a ship, when present, is bound to interfere to prevent gross trespasses and misconduct of his officers towards the crew. If he is present when the officers commit an assault and battery, and he does not interfere, when he may, he is presumed to encourage and consent to it, and is jointly liable for the tort.

Thomas v. *Lane.* 1

2. On an indictment for an endeavor to commit a revolt against the § 12 of the Criminal Act of 1790, ch. 36, it is a sufficient defence of the parties accused, that the combination charged, as an endeavor, was to compel the master to return into port for the unseaworthiness of the vessel, if they act *bonâ fide* and the vessel is actually unseaworthy.

United States v. *Ashton.* 13

3. So if they act *bonâ fide* and upon reasonable grounds and apparent unseaworthiness, and it is doubtful whether the vessel be unseaworthy or not. But if the vessel, in such case, be clearly seaworthy, it is no defence. *Ibid.*

4. It is not sufficient to justify a sale of a vessel by a master, that he acted in good faith, and in the exercise of his best discretion, unless there appears to have been an urgent necessity to sell for the preservation of the interests of all concerned.

The Brig Sarah Ann. 206

5. If an owner of reasonable prudence would have directed the sale from the opinion, that the vessel could not be delivered from the peril without the hazard of an expense, disproportionate to her real value, then the sale by the master must be deemed justifiable. *Ibid.*

6. In a case of urgent necessity, the master has a right to sell the vessel, as well on a home shore, as on a foreign shore, and whether the owner's residence be near or at a distance. It is otherwise, if the necessity be not urgent. *Ibid.*

7. A sale by a master held valid, under the circumstances, and after a survey of the evidence, on the ground of urgent necessity. *Ibid.*

8. *Semble*, if the Court should decree a sale by the master invalid, where the transaction was clear from fraud, it would compel a proper allowance for the expenditures of the original purchasers in getting off and repairing the vessel. *Ibid.*

9. The capture of a neutral ship does not, of itself, operate as a dissolution of the contract for mariners' wages; but at most only as a suspension of the contract.

Brown v. *Lull.* 443

10 If the ship is restored, and performs her voyage, the contract is revived, and the mariner be-

comes entitled to his full wages for the whole voyage, if he has remained on board, and done his duty; or if, being taken out, he has been unable, without any fault of his own, to rejoin the ship. *Ibid.*

11. On a sentence of condemnation against the ship, the contract is dissolved, and the mariner is discharged from any further duty on board, and also loses his wages, unless there is a subsequent restitution of the property, or of its equivalent value, with an allowance of freight. *Ibid.*

12. In the case of a restitution in value, the proceeds represent the ship and freight, and are a substitute therefor, and subject to their liens. *Ibid.*

13. If freight is decreed for the whole voyage, the mariner is entitled to full wages; if for only a part of the voyage, the mariner is entitled only to *pro ratâ* freight, unless under special circumstances, as where the mariner remained by the ship, at the special request of the master, to preserve and protect the property for the benefit of all concerned. *Ibid.*

14. It is the right and duty of the mariners of a neutral ship, after capture, to remain by the ship, while there is any hope of recovering the property; and this is generally done when there is a sentence of condemnation, and *á fortiori* when there is a sale thereof pending the proceedings, or under the sentence of condemnation. *Ibid.*

15. Seamen are peculiar favorites of Admiralty, and contracts between them and ship-owners are scanned with great closeness and jealousy. *Ibid.*

16. Any stipulations in shipping articles, which derogate from the general rights and privileges of seamen, will be held void in Admiralty, unless it shall appear, both that the nature and operation of the stipulation were fully explained to the seamen, and that an additional compensation was allowed, entirely adequate to the new restrictions imposed thereby. And the *onus probandi* is on the ship-owner to establish these facts. *Ibid.*

17. The following clause in the shipping articles was held void; viz. "in case of the said vessel being taken or lost in the course of the said voyage, no wages shall be demanded or received by the subscriber, except the advance wages received by them respectively, at the time of entry on board; and that, if the said vessel should be restrained for more than thirty days at any one time, the wages shall cease during such restraint, and no longer." *Ibid.*

18. Commissioners, upon whom the law has imposed the duty of awarding a full indemnity for certain losses, cannot be presumed to have departed from it; therefore, the compensation allowed to the owner will be presumed to be a full indemnity for his loss. *Ibid.*

19. The lien for seamen's wages attaches to the ship and freight, and their proceeds, into whosesoever hands they may come, and takes priority of all other claims. Therefore, the ship-owners are liable, though they have received certain instalments only of the sums awarded under the treaty, and not full payment; and though a proportion of this has been paid to the underwriters, who had insured the vessel at the time of her loss. *Ibid.*

20. Lull shipped, as mariner, on board of the brig Two Betseys, on 4th of September, 1809, on a voyage from Beverly to Naples, and back again, at the rate of wages of $18 per month. The brig arrived at Naples in November, 1809, and while lying there, was seized, and finally, on the 12th of March, 1810, confiscated and sold. Lull continued on board of the brig until 10th of June, 1810, when he was discharged by the master, with his

own consent, and sailed in another vessel for Salem, where he arrived 19th of August, 1810. By a convention with the King of the Two Sicilies, a provision was made for the indemnity of this, and other American claims; and three instalments were received, amounting in all to more than the present claim for wages; a proportion of the indemnity went to the underwriters, who, at the time of the loss, had insured the said vessel. *Held*, that the libellant, the administrator of Lull, was entitled to recover full wages from the time of Lull's shipment to the time, when he arrived in the United States. *Ibid.*

21. Where there is a deviation from the voyage in the shipping articles, a refusal of the seamen, subsequently, to do duty on that account does not amount in law to an endeavor to commit a revolt, under the Act of Congress of 1835, ch. 40, s. 2.

United States v. *Matthews*. 470

22. The Act of Congress of 1835, ch. 40, § 3, for the punishment of certain maritime offences, provides, that "if any master or other officer of an American ship or vessel, &c., shall, from malice, hatred or revenge, and without justifiable cause, beat, wound or imprison, any one or more of the crew of such ship or vessel," &c., he shall be punished in the manner stated in the Act. *Held*, that "malice," in the sense of the Act, signified wilfulness, or a wilful intention to do a wrongful act; and, that to authorize a conviction under this Act, two things must be shown, first, malice, or hatred, or revenge; and secondly, a want of justifiable cause to inflict the injury.

United States v. *Taylor*. 584

23. The master, when on board, has generally the sole authority to authorize punishment to be inflicted on any of the crew; and if he is present, when any punishment is inflicted by a subordinate officer, and can prevent it, and does not, he is personally responsible for the act. And neither the mate nor any subordinate officer, has authority to punish any seaman, even for improper behavior or misconduct to himself personally, when the master is on board, except by the authority, express or implied of the master, or when the necessities of the ship's service require instantaneous punishment, as by blows or otherwise, to compel a seaman to do his duty. *Ibid.*

24. In the absence of the master, the next highest officer on board succeeds to his rights and authority *pro tempore*, so far as they are necessary for the due performance of the ship's duties. *Ibid.*

25. To sustain an indictment for an endeavor to commit a revolt under the Act of Congress of 1835, ch. 40, § 2, a confederacy or combination must be shewn between two or more of the seamen, to refuse to do further duty on board the ship, and to resist the lawful commands of the officers.

United States v. *Cassedy*. 582

26. The contract of seamen for the voyage is not suspended or extinguished by the death, removal, or resignation of the original master; but they are bound to perform the voyage under any person, who is lawfully substituted in his stead. *Ibid.*

27. If a person, substituted as master, be grossly incompetent to the duties of his station, from want of skill, or bad habits, or profligate and cruel behavior, the seamen may be justified in refusing to do duty, or to remain by the ship. *Ibid.*

See BOTTOMRY BOND.
CHARTER-PARTY.
CONSUL, 2, 3, 6, 8.

SHIPPING ARTICLES.
See SHIPPING, 16, 17.

SLAVE TRADE.

1. By the Statutes of the United States (1820, ch. 113, § 4), it is declared "that if any citizen, &c. shall, on any foreign shore, seize any negro or mulatto, *with intent to make such negro or mulatto a slave*, or shall decoy, or forcibly bring or *carry*, or shall receive such negro or mulatto on board of any such ship or vessel, *with intent as aforesaid*, such citizen or person shall be adjudged a pirate, and on conviction thereof, &c. shall suffer death." *Held*, that a person having no interest in or power over the negroes, so as to impress upon them the future character of slaves, and only employed in the transportation of them for hire from port to port, is not guilty under this Act. *United States* v. *Battiste*. 240

2. It is not necessary, in order to bring the case within the Act, that the negroes should be free at the time of their seizure or reception on board. *Ibid.*

3. "To make the negro a slave," in the sense of the Act, is to be the instrument or means of fixing on him that character for the future. *Ibid.*

4. An African negro or mulatto, when bought on the coast of Africa by an American citizen, or any person belonging to an American ship, ceases to be a slave, since no such person can, consistently with our laws, hold him in slavery. *Ibid.*

See PIRACY, 2.

SPECIFIC PERFORMANCE.
See EQUITY, 4, 5.

STATUTE OF FRAUDS.
See EQUITY, 21, 25.
MORTGAGE, 17.

STATUTES COMMENTED ON.

ENGLISH.

13th and 14th Richard II. Admiralty, 1
29th Car. II., ch. iii. § 4. Frauds, 228

UNITED STATES.

1789, ch. 20. Judiciary, 338
1790, ch. 36. Crimes, 19, 419, 482
1802, ch. 31. Judiciary, 19
1803, ch. 62. Consuls, 355, 419
1804, ch. 40. Revenue, 419
1820, ch. 113. Crimes, 19
1822, ch. 107. Collectors, 575
1835, ch. 40. Maritime Offences, 470, 582, 584

MASSACHUSETTS.

1832, ch. 57. Mortgages of Personal Property, 157

MAINE.

1821, ch. 36. Deeds, 401
1821, ch. 39. Mortgages, 401

NEW HAMPSHIRE.

1808 and 1830. Administrators, 310

RHODE ISLAND.

1798. —— Frauds, 228
1798. —— Wills, 266

STEAMBOATS, PROPRIETORS OF.
See COMMON CARRIERS, 1, 2, 3.

STRANDING.
See INSURANCE, 6.

SUIT, REMOVAL OF.
See REMOVAL OF SUIT.

SURETY.

1. Where the secretary of the treasury releases an insolvent debtor, under the Acts of Congress, upon the condition of the assent of his sureties to the release, without prejudice to their liability, that assent must be by the parties, if living, and if dead, by their personal representatives. An assent by the *heir* of a surety is not sufficient. *United States* v. *Cushman*. 310

2. Where sureties bind themselves jointly and severally as prin-

cipals in a bond, there is no difference, as to their liability in equity for the debt, between them and the principal debtor, for whom they are sureties.

United States v. *Cushman.* 426

3. The defendant Stinson, being Warden of the State Prison of New Hampshire, appointed James as his agent for the sale of granite for the said prison, with power to sell the granite, and collect the moneys arising from the sales. Gass was the surety of James, for the faithful performance of the agency. *Held*, that a change in the relation between Stinson and James from that of mere agency in the sale of granite to third persons, to that of a conditional purchase, or sale and return, would amount to a discharge of the surety, Gass, *pro tanto*, or rather that the transaction would fall without the condition of the bond.

Gass v. *Stinson.* 454

4. It was agreed between Stinson, the obligee in the bond, and Gass, a surety, that if Gass should be dissatisfied with continuing his suretyship in the premises, he should "have a right on ten days notice being given to the Warden of the prison *in writing*, to discontinue his liability as surety, *provided* the accounts of the agent are then all settled up, the balance paid, and the property of the State Prison delivered over to the Warden or his agent." *Held*, that this proviso in this agreement was not a condition precedent to the right of Gass to liberate himself from future suretyship, and that Gass, on giving ten days notice, was entitled to be discharged from his liability for the future conduct of James, continuing, however, liable for the balance then due to Stinson, and for the delivery over of the other property then in his hands. *Ibid.*

5. *Held*, that Gass was discharged from all liability on account of the transactions subsequent to notice of his wish to discontinue his suretyship, and that the necessity of notice *in writing* according to the foregoing agreement was waived, under the circumstances of the present case. *Ibid.*

6. *Held*, that James was a competent witness for Gass under a bill in Equity, brought by the latter to be relieved of his suretyship. *Ibid.*

7. A new bond was executed, and sent to the obligee, to take up and supply the place of the old bond. *Held*, that it was the duty of the obligee to return the new bond forthwith, and to give notice thereof to the parties interested, and that omission to do so, under the circumstances of the present case, afforded a presumption, that it was accepted. *Ibid.*

8. *Semble*, that at law the obligation of a surety, on a bond for the fidelity of a party for an indefinite period, cannot be determined at the will of the surety by notice. *Quære*, if the same rule prevails in Equity. *Ibid.*

TIDE WATERS.

See ADMIRALTY, 2, 3.

TIME.

Where a rightful estate is claimed by each of two purchasers, whose titles in other respects are equal, the maxim prevails, *qui prior est in tempore, potior est in jure.* *Flagg* v. *Mann.* 487

TORTS.

See ADMIRALTY, 1, 2, 3, 5.
CONSPIRACY.
PLEADING, 1.

TREASON.

See BILL OF EXCEPTIONS, 3.

TRIAL.

1. It is not a sufficient ground for a delay of the trial of a capital case, that the party wishes it, in or-

der to procure papers from a foreign country, since this Court cannot issue process, which will be effectual in procuring such papers.
United States v. *Gibert.* 19

2. Whether prisoners shall be tried separately or together, rests in the discretion of the Court. *Ibid.*

3. Where the reason assigned for separate trials was, that the prisoners might use the testimony of each other in their defence; *Held*, that this would not justify the Court in the exercise of its discretion. *Ibid.*

4. *Quære*, if the Court, for the reason assigned, would have a right to grant separate trials, and thus deprive the Government of the right to exclude all the confederates from being witnesses, and render them competent, when they would otherwise be incompetent. *Ibid.*

5. The Clerk of the Court, upon the arraignment of the prisoners, did not further proceed, upon their pleading not guilty, to ask them, how they would be tried, so that they did not make the usual reply, "By God and the country;" *held*, that, under the laws of the United States, the plea of Not guilty put the prisoners upon the country by a sufficient issue, without any further express words. *Ibid.*

TROVER.
See BOTTOMRY BOND, 11.
FUGITIVES.

TRUST.

1. If parties are interested together by mutual agreement, and a purchase is made agreeably thereto, neither party can exclude the other from what was intended to be for the common benefit, and any private benefit, touching the common right, which is secured by either party, will turn him into a trustee for the benefit of both.
Flagg v. *Mann.* 487

2. A *written* agreement by two, to purchase lands on joint account, creates a fiduciary relation between the parties, which neither is at liberty to defeat by a purchase on his sole account, and such a purchase will be in trust for the joint account. *Quære*, If this doctrine is applicable to *parol* agreements. *Ibid.*
See EQUITY, 21, 25.

UNDERWRITERS.
See INSURANCE.

UNITED STATES, CONSTITUTION OF.
See NEW TRIAL, 1, 3, 6, 8.

UNITED STATES, PRIORITY OF.

1. The Statute of 1797, ch. 74, giving a priority to debts of the United States in cases of insolvency, applies to equitable as well as *legal* debts. *Howe* v. *Sheppard.* 133

2. But the United States cannot enforce such priority in a suit *at law*, as assignee of a judgment of a private creditor of the insolvent debtor, where the suit is brought in the name of the creditor, and not in the name of the United States. *Ibid.*

3. *Quære*, Whether the United States may not sue at law as assignee of a chose in action or debt, as such an assignment in case of the Crown would, by the common law, vest a legal title. *Ibid.*

4. Where a joint and several bond was given for duties at the custom-house, and afterwards a joint judgment was obtained against all the obligors (the principal and sureties), and then, one of the obligors (a surety) died; and the survivors became insolvent; it was *held*, that the United States were entitled to maintain a suit in equity for the recovery of the debt out of the assets of the deceased judgment debtor, whose estate was also insolvent, in virtue of their general priority in cases of insolvency.
United States v. *Cushman.* 426

5. In such a case, as between the United States and the obligors on

the duty bond, all of them are deemed principal debtors. *Ibid.*
See COURTS OF U. STATES.

USAGES.
See CUSTOM.

USURIOUS CONSIDERATION.
See MORTGAGE, 21.

VENUE.
See INDICTMENT, 1.

VERDICT.
Where a verdict was taken against the defendants by consent, subject to the report of auditors, in order to ascertain the amount of the loss suffered by the plaintiffs; *Held*, that the defendants, by this course, only admitted, that the plaintiffs had some cause of action, and did not preclude themselves from any inquiry into the cause and nature of the loss, and the amount, which was attributable to the perils insured against. *Donnell* v. *Col. Ins. Co.* 367
See JURY.
NEW TRIAL, 1, 2, 9, 10.
PAYMENT INTO COURT.

WASTE.
See MORTGAGE, 1.

WILLS.
The Statute of Wills of Rhode Island of 1798, § 6, provided, "That any child, &c. not having a legacy given him in the will of his father or mother, shall have a proportion of the estate of his parents assigned unto him, as though such parent had died intestate." This section was repealed in 1803. *Held*, that a will, made in 1801, while the foregoing provision was in force, where the testator died in 1804, after it had been repealed, was not affected by it, but was fully operative to pass a good title to the devisee.
Adams v. *Wilbur*. 266

WAGES OF MARINERS.
See SHIPPING, 9, 10, 11, 12, 13, 19.

WITNESS.
See EQUITY, 7, 8, 13, 15, 28, 29, 30, 31, 32.
EVIDENCE, 2, 3, 8, 9, 12, 13.
MORTGAGE, 18, 19.
NEW TRIAL, 12, 13.
SURETY, 6.

WRIT OF ERROR.
See NEW TRIAL, 7.

Stanford Law Library
3 6105 06 034 970 6

Stanford Law Library
3 6105 06 034 970 6